MSS
546

SEDFRE

(CONT)
Douglas, L.H. et al. vs. C.O.R.E. Nov., 1961 - Nov., 1963

Box [illegible] C
Folder 18

State Historical Society of Wisconsin

Please Retain Original Order

11/10/61

MEMORANDUM FROM
CARL RACHLIN

TO: Robert Collins
Lolis Elie

Enclosed are the following from
Douglas v CORE

1. Motion to Dismiss
2. Motion to dissolve Temp Restraining Order
3. Application for 3 Judge Ct

These are my only copies.
Lots of luck See you soon
Carl

CR

12/1/61

Dear Carl,

Here is my hand-written draft of the brief in the McComb case.

Feel free to make any changes, additions or deletions you like and, after typing, mail to the Court.

Derrick

RECEIVED
DEC 11 1961
VLADECK & ELIAS

AIR MAIL
[illegible] 12, 1961

Hon. Harold Cox
U. S. District Judge of the
Southern District of Mississippi
Jackson Division
Jackson, Mississippi

Dear Judge Cox:

I enclose herewith Memorandum for Defendant in the case heard by you last Thursday. Simultaneously with the mailing of this letter and the enclosed Memorandum, I am sending a copy of both to Mr. Charles Clark.

Thank you for your courtesy.

Very truly yours,

CARL RACHLIN

CR:cr
enc.

cc: Charles Clark, Esq.
Derrick A. Bell, Esq.

December 19th, 1961

Mr. Marvin Rich,
Community Relations Director
CORE
38 Park Row
New York, N. Y.

Dear Marv:

Enclosed is the bill from the Federal Court in the McComb case for the Court Record.

Please take care of it promptly, since, in the event of an adverse opinion, it is absolutely essential.

By the way, it shows a Jackson Court can get a record out reasonably quickly when it wants to.

Regards.

Sincerely,

CARL

CR:rk
cc: Derrick Bell, Esq.

Jack H. Young
ATTORNEY AT LAW
SUITE 207-208 REDMOND BUILDING
115½ N. FARISH STREET
JACKSON, MISSISSIPPI
PHONE FL. 2-7484

RECEIVED
JAN 29 1962
VLADECK & EL...

January 25, 1962

Mr. Carl Rachlin
Vladeck and Elias
Counsellors at Law
280 Broadway
New York 7, New York

Re: Douglas vs. CORE

Dear Mr. Rachlin:

In accordance with your instructions I have this day posted $250.00 cash bond with the Clerk of the United States District Court. A receipt for the bond is enclosed herein.

Last week I received a Western Union money order from CORE in the amount of $250.00. The telegram accompaning the money order stated that it was for attorney fees. Inasmuch as I have not received a fee from CORE for the month of December, I assumed that the $250.00 was the fee. I will greatly appreciate it if you would be kind enough to call this matter to the attention of Mr. Rich and Mr. Farmer.

With best wishes, I am

Yours very truly,

Jack H Young

Jack H. Young

JHY/h
cc: Mr. Marvin Rich
Mr. James Farmer

February 20th, 1962

Miss Loryce E. Wharton, Clerk
United States District Court
Southern District of Mississippi
Jackson, Mississippi

Re: Douglas, et al v. Core
Civil Action 3223-Jackson

Dear Miss Wharton:

Enclosed please find check in the amount of $550.00 to your order for the record in the above entitled case. We wish the entire record printed as referred to in your letter of January 17th.

I want to thank you for all the courtesies extended to me and if there is any question with reference to the above, please telephone me collect.

Sincerely yours,

VLADECK & ELIAS

BY: CARL RACHLIN

CR:rk
enc.
cc: CORE
Certified Mail,
Ret. Rec. Req.-Air Mail

tel #
354-3881

RECEIVED
FEB 28 1962
VLADECK & ELIAS

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
SOUTHERN DISTRICT OF MISSISSIPPI
Jackson, Mississippi
February 26, 1962

Attorney General Joe T. Patterson
State of Mississippi
New Capitol Building
Jackson, Mississippi

Mr. Louis Alford,
Attorney
McComb, Mississippi

Mr. Derrick Bell
Attorney
10 Columbus Circle
New York 19, N.Y.

Mr. Carl Rachlin ✓
Attorney
280 Broadway
New York 7, N.Y.

Gentlemen:

Re: Douglas vs. Core
Civil Action 3223-Jackson
On Appeal

Enclosed is copy of order extending time for filing record on appeal to 90 days from date of filing of first notice of appeal.

Very truly yours,

Loryce E. Wharton, Clerk

E. Mathison
(Mrs.) Elizabeth Mathison
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
FEB 21 1962
Loryce E. Wharton, Clerk
By
Deputy

C. H. DOUGLAS, individually and as Mayor
of the CITY OF McCOMB, MISSISSIPPI, and
MR. & MRS. AUBREY McGEHEE

V. CIVIL ACTION NO. 3223

THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and
MARY DOE

ORDER EXTENDING TIME TO FILE RECORD

It being made to appear to the Court that an appeal has been prosecuted in the above styled case and that the Clerk has not had sufficient time in which to file the transcript of the record in the Court of Appeals and that the time should be extended, for good cause shown it is therefore ordered by the Court that the time for filing the record upon appeal and docketing the action in the Court of Appeals be and the same hereby is extended to ninety days from the date of the first notice of appeal.

ORDERED, this the 21st day of February, 1962.

S. C. MIZE
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

POST OFFICE BOX 23
NEW ORLEANS 6, LA.

RECEIVED
MAY 25 1962
VLADECK & ELIAS

May 23, 1962

Mr. Carl Rachlin
Attorney at Law
280 Broadway
New York 7, N. Y.

Re: The Congress of Racial Equality, Et Al vs.
C. H. Douglas, Etc., Et Al

Dear Sir:

In reply to your letter of May 22, I wish to advise that under the rules of this Court, appellants' brief is due for filing within thirty days from receipt of this Court's Notice that the record is in final form for a hearing. However, in this case, such Notice has not been issued in view of the fact that the docketing fee of $25.00 has not been paid, even though on May 2 a notice for such docketing fee was issued to all counsel. As soon as the case is docketed, the above Notice will be issued to all counsel.

Very truly yours,

EDWARD W. WADSWORTH, CLERK

By Gilbert F. Ganucheau
Deputy Clerk

June 1st, 1962

Hon. Edward W. Wadsworth, Clerk
United States Court of Appeals
Fifth Circuit
P. O. Box 63
New Orleans 6, Louisiana

Re: C.O.R.E., et al. v. C. H. Douglas, et al

Dear Sir:

Enclosed please find our check to your order in the amount of $25.00 for the docketing fee in the above entitled case.

Thank you for your courtesy.

Very truly yours,

CARL RACHLIN

CR:rk
enc.

Douglas

ROBERT EMMETT BURNS
154 EAST 91 STREET
NEW YORK 28, N. Y.

4 June 62

RECEIVED
JUN 11 1962
VLADECK & ELIAS

Dear Carl,

I can be reached at Hayden Hall, 35 Washington Square West, AL 4-8212. Have the board have your number.

Sincerely

Bob

Douglas case

RECEIVED
JUL 6
VLADECK & [illegible]

July 5, 1962

Carl Rachlin, Esq.
280 Broadway
New York, New York

Dear Carl:

I received today a copy of your brief in the McComb case. It looks good and I appreciate your retaining my name as a counsel of record.

Best of luck in getting the injunction reversed.

Sincerely,

Derrick

Derrick A. Bell, Jr.

DAB:jcb

10 COLUMBUS CIRCLE 214 NEW YORK 19, N. Y.

COX, DUNN & CLARK
ATTORNEYS AT LAW
DEPOSIT GUARANTY BANK BUILDING
JACKSON I, MISSISSIPPI

VARDAMAN S. DUNN
CHARLES CLARK
WILLIAM H. COX, JR.

BOX 1046
FL. 2-1266
FL. 2-4172

November 10, 1962

RECEIVED
NOV 13 1962
VLADECK & ELIAS

Hon. Edward Wadsworth, Clerk
U. S. Court of Appeals for the Fifth Circuit
Box 30120
New Orleans, La.

Re: Congress of Racial
Equality v. Douglas et al.
No. 19724

Dear Mr. Wadsworth:

I have talked by long distance telephone with Judge Tuttle this morning and, because of a conflict in my schedule, he has agreed that the above case may be removed from the Houston Texas docket next week. As you know the case is presently set for hearing on Wednesday November 14. Judge Tuttle will advise your office in the future as to when and where the matter will be reset.

He requested that I write to advise you as above and to request that you advise the members of the panel meeting in Houston that the case will be reset later. I have talked with Mr. Rachlin who represents the Appellants and advised him of the change.

Yours very truly,

Charles Clark

Copy to :
Judge Elbert P. Tuttle
Mr. Carl Rachlin

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

POST OFFICE BOX 23
NEW ORLEANS 6, LA.

November 13, 1962

RECEIVED
NOV 16 19
VLADECK & ELIAS

Mr. Charles Clark
Attorney at Law
Deposit Guaranty Bank Bldg.
Jackson 1, Mississippi

Re: No. 19724 - The Congress of Racial Equality etc. -vs- C. H. Douglas, etc.

Dear Sir:

Your letter of November 10th has been received and an entry has been made continuing the case for reassignment on some future date. The members of the Court originally assigned to hear this case in Houston on November 14th have been notified of the continuance.

Very truly yours,

EDWARD W. WADSWORTH, CLERK

By G. F. Ganucheau
Deputy Clerk

GFG/bwc
cc: Hon. Elbert P. Tuttle
Mr. Carl Rachlin

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

POST OFFICE BOX 23
NEW ORLEANS 6, LA.

November 15, 1962

RECEIVED
NOV 1[illegible]
VLADECK & ELIAS

Mr. Charles Clark
Attorney at Law
Deposit Guaranty Bank Bldg.
Jackson 1, Mississippi

Re: No. 19724 - The Congress of Racial Equality, etc.
-vs- C. H. Douglas, etc.

Dear Sir:

Supplementing my letter of November 13, I am authorized to advise that this case has now been reset for hearing at New Orleans with the appeal in No. 19703, Congress of Racial Equality, etc., vs. Bryan Clemmons, et al, on Tuesday, December 11, 1962. Counsel desiring to present argument should be present at Room 222, Camp Street Post Office Building by 9:30 a.m. on that date.

Yours very truly,

E.W. Wadsworth

EDWARD W. WADSWORTH,
Clerk

cc: Mr. Carl Rachlin

Carl ?

CORE - Douglas

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

POST OFFICE BOX 30120
NEW ORLEANS 30, LA.

June 26, 1963

RECEIVED
JUL - 1 1963
VLADECK & ELIAS

Mr. Charles Clark
Attorney at Law
P. O. Box 1046
Jackson, Mississippi

Re: No. 19724 - The Congress of Racial Equality, Et Al vs. C. H. Douglas, Etc., Et Al

---

Dear Sir:

Pursuant to your request by letter dated June 25, find enclosed certified record in the referenced cause for your use in the Supreme Court of the United States. Should any additional papers be needed they can be certified as a supplemental record.

Also enclosed is a copy of the Opinion and Judgment, which should be printed as an appendix to your petition for writ of certiorari, as provided by the rules of the Supreme Court. My statement in the amount of $6.15 is also enclosed to cover the cost of certifying the proceedings and the extra opinion which I ask that you please remit.

Please acknowledge receipt.

Very truly yours,

EDWARD W. WADSWORTH, CLERK

By G. J. Gauchau
Deputy Clerk

Encls.

cc: Mr. Derrick A. Bell, Jr.
Mr. Carl Rachlin
Mr. Peter M. Stockett, Jr.
Mr. William A. Wiltshire

J.P.V.
Please N.B
CR

One Wall Street
New York

RECEIVED
AUG 12 1963
VLADECK & ELIAS

August 9, 1963

Carl Rachlin, Esq.
280 Broadway
New York, New York

Re: McComb v. CORE

Dear Carl:

Here is a draft of brief in opposition to petition for certiorari in the above action. If you like it, let's discuss it this week, as I have to go to Army summer camp next weekend.

Sincerely,

Paul G. Chevigny

Paul G. Chevigny

Enclosure

Carl
Read + with
minor typo + corrections
OK
SW

D

RECEIVED
AUG 19 1963
VLADECK & ELIAS

Carl Rachlin, Esq.
280 Broadway
New York, New York
Re: McComb v CORE

Dear Carl:

I have sent the brief to press, but I have to go to the Army tomorrow, and I will not be able to serve it. As I understand the procedure, it is as follows:

(a) Forty copies filed with Supreme Court, with certificate of service on opposing counsel (This ~~need~~ is not in our case, and need not be, under Rule 33(3) of the Supreme Court, included in the brief. May be a separate document.

(b) Three copies on each opposing

attorney.

I send the record and briefs herewith.

In answer to your other question, about jurisdiction of the Mississippi ferry, I have no final opinion, only a horseback opinion.

(1) There seems to be no statute for interstate ferries generally.

(2) The statute regarding special jurisdiction is 18 USCA §7. The cases indicate:

(a) There probably is state jurisdiction over the river. *U.S. v Harvey*, 54 F. Supp. 910 (D.C. Ore. 1943) (Columbia River)

(b) Even if there is Federal jurisdiction, there probably is concurrent state power. *Koopengarner v. U.S.*, 270 F2d 465 (1959)

(c) Unless there is a special Mississippi River jurisdiction statute, (there may well be, but I can't find it), the above will apply.

Best of Luck

Paul Chevigny

October 15, 1963

Mr. James Farmer, National Director
Congress of Racial Equality
38 Park Row
New York 38, New York

Dear Jim:

I am happy to advise you that the U.S. Supreme Court denied certiorari in the application of the City of McComb for review of our favorable decision in the Fifth Circuit. May I take this opportunity to tell you of the extremely valuable help we received from Paul Chevigny, a very able young lawyer associated with the firm of Hughes, Hubbard, Blair & Reed.

Kind regards.

Sincerely yours,

CARL RACHLIN

CR:cr
cc: Marvin Rich
    Paul Chevigny, Esq.

[illegible]
[illegible]

October 15, 1963

Paul Chevigny, Esq.
Hughes, Hubbard, Blair, Reed
One Wall Street
New York, New York

Dear Paul:

Thanks for consenting to prepare an answer in our case which, as I indicated, would come up for public trial again on or about November 18. I would like to have the answer within the next few days, if possible.

Thanks for all your help.

Sincerely,

CR:cr

CARL RACHLIN

COX, DUNN & CLARK
ATTORNEYS AT LAW
DEPOSIT GUARANTY BANK BUILDING
JACKSON I, MISSISSIPPI

VARDAMAN S. DUNN
CHARLES CLARK
WILLIAM H. COX, JR.

P. O. BOX 1046
TELEPHONE FL. 2-1268
FL. 2-4172

October 24, 1963

RECEIVED
OCT 25 1963
VLADECK & ELIAS

Carl Rachlin, Esq.
280 Broadway
New York, New York

Re: No. 3223 - Jackson Division Civil Action - C. H. Douglas, et al (Revived as Gordon Burt, et al) v. The Congress of Racial Equality.

Dear Carl:

I don't see any advisability of agitating what is now a peaceful solution to the McComb bus terminal situation. If you are agreeable to the entry of some type of a final order dismissing these proceedings in the trial court, I will recommend to the city officials that we terminate the litigation in this fashion.

Please let me know your wishes in the premises.

Yours very truly,

COX, DUNN & CLARK

Charles Clark

lm

COX, DUNN & CLARK
ATTORNEYS AT LAW
DEPOSIT GUARANTY BANK BUILDING
JACKSON 1, MISSISSIPPI

VARDAMAN S. DUNN
CHARLES CLARK
WILLIAM H. COX, JR.

P. O. BOX 1046
TELEPHONE FL. 2-1268
FL. 2-4172

October 24, 1963

Hon. William Harold Cox
U. S. District Judge
P. O. Box 2447
Jackson, Mississippi

Re: No. 3223 - Jackson Division Civil Action - C. H. Douglas, et al (Revived as Gordon Burt, et al) v. The Congress of Racial Equality.

Dear Judge Cox:

While the above matter is technically not on appeal, on the 14th day of October, 1963 the Supreme Court denied our petition for a writ of certiorari to the U. S. Court of Appeals for the Fifth Circuit. Counsel for the plaintiffs in the District Court are now trying to determine whether or not a petition for rehearing should be lodged with the said Supreme Court.

We do not believe that in the present posture of the matter it should be set down for final trial or disposition at this time.

Respectfully yours,

COX, DUNN & CLARK

Charles Clark

Charles Clark

lm

cc: Carl Rachlin, 280 Broadway, New York, New York
William A. Wiltshire, P. O. Box 1061, McComb, Miss.
Louis A. Alford, P. O. Box 8, McComb, Miss.

Douglas v Co e

October 29, 1963

Paul Chevigny, Esq.
Hughes, Hubbard, Blair & Reed
One Wall Street
New York, New York

Dear Paul:

Thank you for your draft in the McComb case. On receiving it, I called Charley Clark, our opposition. Even though we rarely agree, we get along well personally. He advised me that it was his view that the case should not be tried and he would see if he could arrange a discontinuance.

I will keep you advised. By the way, would any of your friends be available to draft a petition for Certiorari on two Louisiana cases? The present deadline in the U. S. Supreme Court is about December 8th, 1963.

This is not a covert request to you. In fact, if you volunteered, I would say "NO" because you have done so much. If you have a friend, however, let me know.

Regards,

CR:sr

CARL RACHLIN

October 30, 1965

Charles Clark, Esq.
Cox, Dunn & Clark
Deposit Guaranty Bank Building
P. O. Box 1046
Jackson 1, Mississippi

Re: Douglas (Hurt) v. CORE

Dear Charley:

It was good talking to you on the telephone the other day. I look forward to seeing you.

I think your suggestion to an order dismissing the proceedings is wise and I will urge it strongly.

With kindest personal regards.

Sincerely,

CARL RACHLIN

CR:sw
b/cc: Paul Chevigny, Esq.

COX, DUNN & CLARK
ATTORNEYS AT LAW
DEPOSIT GUARANTY BANK BUILDING
JACKSON I, MISSISSIPPI

VARDAMAN S. DUNN
CHARLES CLARK
WILLIAM H. COX, JR.

P.O. BOX 1046
TELEPHONE FL 2-1268
FL 2-4172

November 4, 1963

RECEIVED
NOV 6 1963
VLADECK & ELIAS

Carl Rachlin, Esq.
Vladeck & Elias
280 Broadway
New York 7, New York

Re: Douglas (Burt) v. CORE

Dear Mr. Rachlin:

I enclose herewith a motion for substitution of parties, together with a suggested form of order thereon and an order passing this cause to the files.

In view of the judgment and mandate of the Court of Appeals annulling the preliminary injunction, this will, in my opinion, mean that no relief is granted to the plaintiffs and will at the same time avoid the necessity for the City officials entering a stipulation of dismissal.

Please examine these proceedings and advise me whether or not your client consents to handling this matter in this manner.

Yours sincerely,

COX, DUNN & CLARK

Charles Clark
Charles Clark

lm

cc: Mr. William A. Wiltshire
Mr. Louis A. Alford

P.S. Nothing is being filed until I hear from you.
C.C.

Dear Charles

Obviously, I have no objection to the substitutions set forth in your proposed motion. You may state so, in my behalf. I must confess, however, that I do not understand, although perhaps I should, how this will mean that we will not have to retry the same matter again in the future.

Please enlighten me

Sincerely

November 6, 1963

Charles Clark, Esq.
Cox, Dunn & Clark
Deposit Guaranty Bank Building
Jackson 1, Mississippi

Dear Charles:

Obviously, I have no objection to the substitutions set forth in your proposed motion. You may state so in my behalf.

I must confess, however, that I do not understand, although perhaps I should, how this will mean that we will not have to retry the same matter in the future.

Please enlighten me.

Sincerely,

CR/bs

CARL RACHLIN

WILLIAM A. WILTSHIRE
ATTORNEY AT LAW
MORGAN & LINDSEY BUILDING
P. O. DRAWER 527
McCOMB, MISSISSIPPI

AREA CODE 601
TELEPHONE 684-2841

RECEIVED
NOV 20 1963
VLADECK & ELIAS

18 November 1963

Carl Rachlin, Esq.,
Vladeck & Elias,
Counsellors at Law,
280 Broadway,
New York, 7, New York

Re: C. H. Douglas (Gordon Burt), et al. v. The Congress of Racial Equality Civil Action No.3223 - U. S. District Court, Southern District, Jackson Division

Dear Mr. Rachlin:

On behalf of the City of McComb City, Mississippi, we request that you agree to the entry of an order by the U. S. District Court for the Southern District of Mississippi passing the above referenced cause to the inactive files of the court, pending further order of the court; and in connection with your consideration of this request, the City of McComb represents that it does not desire to litigate this matter further.

The City of McComb feels that remanding the case to the files would be the proper way to dispose of the litigation in its present posture.

Yours very truly,

William A. Wiltshire

William A. Wiltshire
City Attorney

WAW:h

Douglas v CORE

November 20, 1963

Hon. William A. Wiltshire
Morgan & Lindsey Building
P. O. Drawer 327
McComb, Mississippi

Dear Mr. Wiltshire:

I have your letter of November 18, 1963. Since you advise me that the City of McComb has no further interest in this litigation, I have no objection to the entry of an order referring the matter to the inactive files of the court.

Very truly yours,

CARL RACHLIN

CR:gr
b/cc: Charles Clark, Esq.

COX, DUNN & CLARK
ATTORNEYS AT LAW
DEPOSIT GUARANTY BANK BUILDING
JACKSON I, MISSISSIPPI

VARDAMAN S. DUNN
CHARLES CLARK
WILLIAM H. COX, JR.

P. O. BOX 1046
TELEPHONE FL. 2-1268
FL. 2-4172

November 26, 1963

RECEIVED
NOV [illegible]
VLADECK & ELIAS

Carl Rachlin, Esq.
280 Broadway
New York 7, New York

Derrick A. Bell, Esq.
10 Columbus Circle
New York 19, New York

Re: Douglas, et al. v. The Congress of Racial Equality. No. 3223, Southern District of Mississippi Jackson Division.

Dear Carl and Derrick:

Judge S. C. Mize this day signed both the order reviving the cause as to new parties and the order remanding the cause to the files, which were previously submitted to you.

Yours very truly,

COX, DUNN & CLARK

Charles Clark

Charles Clark

lm

cc: William A. Wiltshire, Esq.
Louis A. Alford, Esq.

JUL 30 REC'D

COX, DUNN & CLARK
ATTORNEYS AT LAW
DEPOSIT GUARANTY BANK BUILDING
JACKSON 1, MISSISSIPPI

VARDAMAN S. DUNN
CHARLES CLARK
WILLIAM H. COX, JR.

P. O. BOX 1046
TELEPHONE 354-3783
AREA CODE 601

July 29, 1964

CORE
v
Douglas
(McComb injunc)

Carl Rachlin, Esq.
Vladeck & Elias
Attorneys at Law
280 Broadway
New York 7, New York

Re: Douglas v. CORE

Dear Carl:

The reason for not accepting your call this morning was that I did not have anything definite from the Court to tell you. Judge Cox has had a docket set out of town and has just returned here this week. I, in turn, have been in Court every day, including today. I assure you that this cause will not be tried or called for trial, and further assure you as counsel for Plaintiff that it will either be remanded to the files or dismissed as moot.

Yours sincerely,

COX, DUNN & CLARK

Charles Clark

Charles Clark mLL

CC:llm

A-T-T-E-N-T-I-O-N A-T-T-E-N-T-I-O-N

CITIZENS--PATRIOTS--STATES RIGHTERS OF LOUISIANA
TEACHERS--UNIVERSITY AND HIGH SCHOOL STUDENTS
JOHN BIRCHERS AND MEMBERS OF THE BLUE SHIRTS.

Your attention is called to an article in the Times Picayune in which it is stated that a stage production at LSU-NO entitled "The Queen and the Rebels" was canceled because a negro student was given a part in it.

The Committee for the Preservation of our Southern Way of Life of the Louisiana Branch of The National States Rights Party wishes to state that to the best of our knowledge negroes are admitted to this university only under court order--backed by the power of the federal bayonet.

There are no federal bayonets saying (as yet) that one has to integrate his social activities. We think you students should request that the person or persons responsible for this voluntary act of integration be dismissed from the university.

LSU at Baton Rouge has snubbed its nose at the Sugar Bowl committee and is trying to force an issue whereby it can play against negroes in another bowl game. Certain people seem determined to do all in their power to help the federal government break down our way of life here in the southland.

An anonymous member of the Sovereignty committee is reported as saying he would have no qualms about LSU playing against a team having negro players. We think this man has no right being on the Sovereignty committee and should be removed.

And finally, worse yet, a member of the joint legislative committee on segregation (anonymous of course) says "I personally would see no objection to the Tigers going to the Rose Bowl and competing against a team which includes negro players -- after all, don't negroes attend LSU?"

The force of federal bayonets is why they are there--but that does not mean they have to enter into social activities -- or that we must break down our customs and traditions as some politicians would have us do.

Mrs. Caatha D. DeLoach, assistant to J. Edgar Hoover, FBI head, says that commies are waging a campaign -- right now -- on college campuses to ensnare students. Students DON'T listen to these traitors. Communism can give you NOTHING. It can take from you what you and your families now have. Be an American--think American--act American.

Many people are beginning to speak out against the left-wingers in our universities--Dr. Fred Schwarz of the Christian anti-communist Crusade --Maj.Gen. Edin A. Walker, U.S.A. (resigned) Senator Strom Thurmond of South Carolina--Carlton Putnam-- to name a few. For the good of the country we must strive to eliminate these people from positions where they can mould the minds of our youth and replace them with good religious believers in God and country and teachers of good, clean, pure and unadulterated Americanism.

Don't say it can't happen department: Barbara Ines Collins, 25 daughter of a Methodist minister, has taken up citizenship in Cuba and now works for the Communist-aligned Fidel castro regime (news item) Our comment: This is what can happen when they are indoctrinated with false doctrine--inspite of good upbringing at home.

(Distributed by the Louisiana Branch of The National
States Rights Party P.O. Box 4342 New Orleans, La.)

MAY IT PLEASE
THE COURT

I A Appeal from order of Judge
Cox dated 12/18/61 granting
the temp injunction

(B) The time of the clerk to
get the record ready was extended
twice ~~until~~ the last time
until May 1, 1962

(C) the record is a full
record — 6 witnesses
called by plff

numerous exhibits

McComb

v

Complaint

I J^{n} § 1332 & 1343 Title 28

II (a sponsoring financing encouraging
(b J.D. & M.D. to come to McComb
(c after publicizing intent to do so
(d to foment violence
(e to provoke breaches of peace
(f in & around terminals

III (a "agitation" by J.D. & M.D.
(b provoked violence at Greyhound
(c was calculated to & will provoke future violence

V McGehee forced to close

VI (a unless restrained defts will
(b unlawfully sponsor finance
(c persuade to come to McComb
(d to foment violence

R. Ⓟ

Temp ~~Injunction~~

Ny
12/2/66

1— appear that immediate
. irreparable injury to plffs

2— damage to restaurants owner
was irreparable

Ordered

(CORE JD, MD)
& officers etc
enjoined from continuing to
sponsor
~~finance~~
~~encourage~~
pickets to
use facilities in McComb
for the purpose of fomenting violence

Excluded is normal travel

Violences

pp3 re Photographer near his
station got into a
scrap with some by
stander

McGehee p140 - Girl demanded service
slapped on counter

p141 - told them to go into the
other room for colored

No restaurant serves white &
colored

p148 Restaurant closed
CORE was sending word

Errors of Ct

p120 1 - allowed hearsay as to loss by merchants re/to cause drop in sales tax revenue

2 -

①

FACTS

I - ICC order

Douglas II City Injunction v McComb
Nov 25th, 1961 p 125

III (a) Tuesday the 28th City Council meeting re injunction
(b) decided to refrain from placing any police inside the station
(c) Heard people coming [illegible] from Wire Services

Gordon IV Wednesday the twenty ninth
" 72 (a) Bus arrived - ~~static~~ 5
" p72 negroes on it
" 173 (b) Station closed because of gas leak
(c) Groups standing around station
(d) negroes left
" p74 (e) no acts of disorder by Negroes

p77 - Guards obeying police

p85 - On Wednesday 29th of Nov — 5 Negroes entered station & physically ejected by persons in station

Gordon p103 - never saw passengers commit any acts of violence

103 only acts were by bystanders

103 - incident with photographer not with CORE

104 After violence against depts on Wednesday the mayor received interpretation from Justice dept (Burke Marshall) that a policeman could be placed in the station

Gordon 115 - On Wednesday "all hell" broke loose when bus riders sought service at lunch counter in station

Gordon p109 Prof McGehee owner of counter had told them to move to colored side

p129 On Thursday 30th
after talk with Burke Marshall
put man in station

p 130 no more cases after that

McGehee 140 Girl rapped
141 Asked them to go to colored room

146 Restaurant – heard CORE was coming. "I figured the best thing I could do was to shut up."

150-1 – Cross-ex showed he had been losing money for some ~~time~~ months before these incidents

151 – Altho he said the City had calmed down after the TRO, he did not reopen when asked why
"That's my business"

154 – He agreed he would be the only one in McComb to serve Negroes

Gaffney

173 - Gaither knew people were coming into McComb

Officer Smith ~~192~~ - Saturday Dec 2
p. 200 Negroes who came on bus behaved quietly

p 201 - Police had situation under control on both
Friday Dec 1
Sat Dec 2

Chief Guy

p 205 FBI told him CORE people coming on Wednesday
They came in

207 later FBI told him they would be back at 3:20-3:25 P.M.

But fracas happened shortly after 3

208 - no officers there at time of fracas

208 no officers at station thereafter with officer in station

210 They came earlier than expected

211 Negroes behaved orderly
in all occasions

except for seating on counter

Analyses of Judge's Opinion

Motion to dismiss complaint denied

Motion to refer to three ~~man~~ judge court denied

Findings of Fact

1- McGehee closed his restaurant as a result of violence fomented by deft app't

p 239

2- Defts & others came to McComb to foment violence

3- Came to McComb to test "the tempers of the community which upon arrival they deliberately set about to provoke

4 "to incite disturbances & violence

p 240 5 The A referred to the "rude female mercenary" who rapped on the table

5 - she deliberately wanted people to attack her

6 - "That kind of misconduct... cannot be tolerated

7 that ct has jur of subject matter - attack on jur has no merit

Conclusions of law
plf entitled

Prelim Injunction

1 Ct has jur of subject matter

2 that irremediable loss is suffered by plfs

3 that CORE wanted to pit the tempers of the people

4 that CORE mislead police ~~people~~ by arriving early "tricked the police"

(5) acts taken to gain notoriety
self aggrandizement
"not bona fide" users
of transportation

6 ———

7 can't provoke others to breach of peace

CORE enjoined from
(a) sponsoring encouraging
or financing persons
(b) to use facilities of
transportation
(c) for purpose of
promoting violence or
(d) provoking breaches of peace

(e) or for purpose of securing
notoriety
(f) or for purpose of testing
procedures

Respectfully Submitted

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~~Bar~~
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MAY 7 1962

I An injunction would violate appellant's rights to freedom of speech, association and assembly in contravention of the First Amendment to the Constitution.

The right of CORE and its members to assist, encourage, associate and assemble with those attempting to integrate interstate bus terminals and facilities is a protected right under the First Amendment to our Constitution. As the Supreme Court stated in De Jonge v Oregon 299 US 353 (1936)

> "The question is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." 299 US at 365

The purpose of CORE's activity is to promote peaceful integration and such activity is immune from state or federal intervention under the First Amendment, due process, equal protection and the commerce clause in the Constitution. Boynton v Com. of Virginia 364 US 456 (1960), Aaron v Cooper 257 F 2d 33 (1961), Burton v Wilmington Parking Authority 365 US 715. As the Supreme Court stated in N.A.A.C.P. v Alabama 357 US 449 at 461,

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

United States District Court
Eastern District of New York

Title

Notice is hereby given that Richland Securities, Inc. a corporation, and Joseph Abrams, two of the D's above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 18th day of December, 1959.

Dated: New York, N.Y.
(date)

U & I
Atty for
Core
280 Bwy
N.Y.

Conclusion

On Nov 27th 1961 a United States Federal Court ordered an end to segregation practices in the inter-state bus terminals at Mc Comb City. On Dec 2d the Complaint in this proceeding was filed in district Court. In the intereum, negro citizens and appellants. in this action, attempted to use ~~Mc Cobmb~~ Mc Comb City facilities on an intergrated basis. Their efforts were met with indifferance by the city, and hostility and violence by local

~~wite~~ white groups. Some of the so called "freedom riders" were colored citizens and residents of Mc Comb city.

At all times they were peaceful.

The city of Mc Comb city has asked a Federal Court to enjoin and thereby supress further integration at the terminals. Appelants respectfully urge that no Court in the land may prohibit American citizens from acting in concert one with another in lawful assembly and pursuit ~~of~~ ~~of~~ ~~the~~ their Constitutional rights to use freely interstate bus terminals and the facilities appurtenant thereto. Whether appellants activity be labeled as "testing", a "freedom ride," "a demonstration" or merely ingress to Commerce appellants submit that where as here the activity is peaceful no Court may enjoin the conduct. This Court of Appeals in examining as it must, not the sporadic incidents precipitated by those poisoned with prejudice, but the conduct of Appellants, will it is urged. reverse the District Court decision.

Brief for Appellants

Statement

Appellant appeals from ~~an~~ a ~~temporary~~ preliminary injunction issued by the Honorable Harold Cox, sitting in the ~~district~~ U.S. District Court for the Southern District of Mississippi, Jackson Division on ~~Decemb~~ the 22nd day of December, 1961, that on December 2nd, 1961 the Honorable Sidney C. Mize issued a temporary restraining order ~~set forth~~ (T.R. p15-16). That a hearing on the application by Appellees for ~~a temporary restraining~~ a preliminary injunction was heard by ~~the~~

The Honorable Harold Cox on December 7th, 1961. that the Clerk's Certificate ~~attesting~~ certifying to said record is on page 255 of the record on file with this Honorable Court

Evers v Dwyer

358 US 202
3 L Ed 222
79 S Ct 178 1958

"for the purpose of the litigation" is not significant

Declaratory judgment re bus segregation statute under Tenn

3 man ct dismissed complaint - "no actual controversy"

"Appellant ... had boarded the bus for the purpose of instituting this litigation."

Mayor Douglas as a witness
adverse party
Rule 42 B

Did he issue statement
from newspapers

and if Did Justice dept offer
Marshalls
Mayor turned it down

Motions as drawn up

① — Convening of 3-man ct.

② — Motion to Stay Action based upon the other ~~three~~ action's existence

③ — Motion to Dismiss

(a) — fails to state cause of action for relief

(b) no $10,000 for each person

(c) doesn't allege citizenship of all the parties for diversity

(d) not deprived of any rt ~~to~~ under § 1343

(e) Interstate Com Act prohibits racial discrimination

(f) ~~Cor~~ Burden on Commerce Clause Art I § 8

(g) repugnant to 1st Amend speech, assembly

+ Due Process of 14th Amend

(h) Complaint would enforce segregation + discrimin contrary to Due Process of 1st Amend. + Due Proc, Equal Protect of 14th

(i) lack of Due Proc — relief sought is vague

(j) Complaint would deprive ~~Pl~~ Defts of rts under law the Mayor et al of McComb

(k) — deprives of defts of rts

under due proc of 1st Amend.

(d) deprivation of privileges
& immunities 14th

m

①

Opening motion

MOTION TO STAY

1- Parties should be reversed

2- or in the alternative the wrong defendants are in court - ~~these are the~~ the victims of unruly mobs are restrained not the unruly mobs

3- US v Mayor etc of McComb bears directly on this problem

(read "b & c")

4- That Court should be allowed to decide what merit, if any, ~~and against whom, the McGehee~~ - there is to McGehee complaint - and against whom

5- Only ~~can~~ conflict of court decisions can result from the continuance of this proceeding, whatever way it goes

6 - The trial of the case of US v Mayor of McComb

⑥ will involve testimony STAY that of necessity must be elicited here.

7 - Restraining here attempts to limit use of the McComb terminal. If the other case opens up the Terminal. If there is any limitation, that should be decided ~~to~~ by the 3 man court - as well as against whom

8 - In effect the restraining here deprives people of rts granted by the 3 man court, & ~~not becau~~ this is so not because of anything they have done, but because of what others have done.

9 - ~~At~~ Certainly to the 3 man Court the mayor can explain the nature of his problem and request relief.

10 - In connection with this, and in addition this proceeding vitally affects the recent order of the Interstate C C and the limitation, if any, to be placed upon that order that of necessity must be considered by a 3 man court, either the one already convened or a new one.

Cross ex Ask Tom Gaither or Mayor
Police Chief

1 - were any arrests made in McComb. - Yes

2 - Had Mayor made any statements of compliance - Yes

3 - Did Tom rely on this - Yes

4 - Has McGehee restaurant been closed

5 - Has mayor police done anything to help find out if mob collected by Klan or other groups?

6 - Did he call people to police & question them ask how they got there & whether anyone asked them to go there

7 - Had McGehee read complaint

8 - Did he retain Clark?

9 - Did McGehee refuse to serve them

(This is important since it may be an issue of clean hands - McGehee

Cross ex 2

must allege their own unlawful act in
order to get relief here)

10- ~~Any~~ when was main violence
wednesday

11 - since then
no cops
- spoke to Burke Marshall

Pomeroy's Equity Jurisprudence.
5th ed. (1941

The doctrine of clean hands is subservient to the public policy of the state and cannot be invoked to prevent relief which it is the policy of the state to give. *Heflinger v. Heflinger*, 136 Va. 289, 118 S.E. 316, 32 ALR. 1088

"A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity." Mr Justice Brewer for ct. in *Deweese v. Reinhard*, 165 US 386, 390, 17 S. Ct. 340, 341.

"He that hath committed iniquity shall not have equity. He that hath engaged in a fraudulent enterprise cannot complain that his associate in fraud has not kept the faith" *Primeau v. Granfield*, 193 F 911, 114 C.C.A. 549, cert denied 225 US 708, 32 S. Ct 839.

§1349 A Ct. of equity has juris. to restrain existing or threatened public nuisance by injunction at the suit of the state, people etc. A public nuisance must be established by clear evidence, before the preventive remedy will be granted. In re Debs, 158 U.S. 564, 15 S. Ct. 900

§1347. Injunction is never granted {merely} to restrain criminal acts, {Crimes are confided to the criminal courts, and the remedy by indictment and prosecution is deemed to be adequate].
Harkrader v. Wadley, 172 U.S. 148, 19 S Ct. 119.

State ex rel. Collins v. Marshall, 100 Miss 626, 56 So 792 (1911)

Motion to Dissolve T R O

to Dismiss

2 — Mayor, chief & McGehee attitude toward the injunction

1 — No cause is stated against these ~~pltfs~~ defts

pts
1
7
8
11
12

(a) they committed no wrongful acts

(b) No injunc can be granted because of the threat of unlawful acts of 3rd parties

(c) the third parties should be enjoined as in the case of W St Clair's in Montgomery

(d) the newest case is Rockwell case injunc rev'd ~~[illegible] 749~~ 10 NY/2d 749 cert den'd just recently in 30 US Law Week

(e) must prove they ~~came to foment violence~~ committed some wrongful acts

(f) purpose is not important
Evers v Dwyer

acts are important — unlawful
their fomenting violence — Blackmail
peaceful testing of legislation

(g) McGehee has no action

h – not a reliable witness

i –

Amer Com Assn v Douds
335 US 382

Argument

1- Wrong case tried here
this case already ~~tried~~ heard
in Montgomery

2- We have made these
motions in support of this.

3- This T R O & any
such prelim injunction requires
that contempt depends not on
the acts of the deft but on the
state of mind of the listener
or believer -

4- ~~This becomes a form~~
If T R O becomes a prelim
injunc - this is a form of legalized
blackmail
Must threaten - can't do legal
thing.

Cross - Ex
mayor

P

Observance of events

Did he request assistance from
State Police ?
federal Marshalls ?

Motions to Cox

1 — should be Heard by 3 judge court —

should move to intervene

Motions

(a) 1343(3) - no jur under this
no state action

(b) no diversity argument
party allegations
(1) of ~~Pltfs~~ McGehee
and of Does - no proper
jud any
(2) if we are left with
diversity and
intentional tort

How does Lacy type
Apc intentional — out of mouths
of our witnesses

(d) — no claim stated against defts
upon which relief can be granted.

(8) (i) — the injunc ~~denies~~ is repugnant to Com Act & Regulations thereunder 49 C Fed Reg 180a

(ii) repugnant to 1st amend — speech, ass'n assembly
NAACP v Ala — membership
corp. can assert rts of members

(iii) XIV, 15th amend — in effect racial segregation is being upheld in behalf of state corp

(iv) injunc is vague so as not to warn persons of conduct prohibited

(v) Title 42 § 1581 — racial protection protects these people

(vi)

(vii) that the relief cannot be granted because the TRO is an injunction in effect against the 3 man court decision

CORE-
Dayford

TABLE OF CONTENTS

Statutes

Interstate Commerce Act Part II
49 U.S.C. 316 (d)

Regulations

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(a) (amended)

Articles

109 U. of Pa L Rev. 67 (1961)

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(D.C. Kan 1941) - 19
Boynton v Com. of Virginia 364 U.S. 450 (1960) - 8, 10
Burton v Wilmington Parking Authority 365 U.S.
715 (1961) 8-10 ~~9~~
Cantwell v Conn 310 U.S. 296 (1940) - 8, 15, 18
Chaplansky v New Hampshire 315 U.S. 568 (1941) - 9, 16
De Jonge v Oregon 299 U.S. 353 (1936) - 7-8
Duncan v Missouri 152 U.S 377 (1893) - 14
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F. Supp 300 (D.C. Col 1957)

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Hague v C.I.O. 307 U.S. 500 (1939) - 13, 15, 18
Hamilton v Regents of Univ. of Cal 293 U.S. 245 (1934) - 14
Herden v Lowry 301 U.S. 242 (1937) - 16.
Holmes v City of Atlanta 350 U.S. 879 (1955) 10
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Lenroot v Interstate Bakeries Corp 55 F. Supp 234 (D.C. Miss 1944) - 20
Lovell v City of Griffin 303 U.S. 444 (1937) ⑮
Macintosh v United States 283 U.S. 605 (1930) 13
Mayor and City Council v Dawson 350 U.S. 877 (1955) 10
Maxwell v Bugbee 250 U.S. 525 (1919) - 14
N.A.A.C.P. v Alabama 357 U.S. 449 (1957) - 8
Near v Minn 283 U.S. 697 (1930) - 15.
Palko v Conn 320 U.S. 319 (1943) - 8
Rockwell v Morris 26 Misc 2d 229, Rev 211 N.Y.S. 2d 25 (1962) - 18
Saia v People of N.Y. 334 U.S. 558 (1947) 15
Sellers v Johnson 163 F. 2d 877 (1947) - 11
Schwimmer v U.S. 219 U.S. 644 ( ) - 13
Slaughter House Cases 16 Wall 36 (1873) - 14
Stapleton v Mitchell 60 F. Supp 51 (1945) 15
Staub v City of Baxley 355 U.S. 313 (1957) 8
STromberg v Cal 283 U.S. 359 (1931) - 9, 13
Terminiello v Chicago 337 U.S. 1 (1948) - 9
Thomson v City of Louisville 362 U.S. 199 (1957) 16
Thomas v. Collins, 323 US 516, 530 — 8, 12, 15

Truly v. Wanzer et al., 5 HOW. 141, 46 US 141 - 19

Twining v N.J. 211 U.S. 78 (1908) - 14
U.S. v C.I.O. 77 F.Supp 355, aff. 335
U.S. 106 (1947) - 13
U.S. v Mayor and Selectmen of McComb - 17
City. Civil Action no 3215 (Miss. D.C. 1962)
Winters v People of N.Y. 333 U.S. 507
(1947) - 16

Table of Cases

Alabama v United States, 279 U.S. 229 (1929) 9

Edwards v. South Carolina, 372 U.S. 229 (1963) 5, 6

Feiner v. New York, 340 U.S. 315 (1951) 7

Grosjean v American Press Co., 297 U.S. 233 (1936) 9,

Hague v. C.I.O., 307 U.S. 496 (1938) 9

Kingsley International Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684 (1959) 9

Louisiana v. N.A.A.C.P., 366 U.S. 293 (1961) 9

N.A.A.C.P. v Alabama, 357 U.S. 449 (1958) 8

N.A.A.C.P. v Button, 371 U.S. 416 (1963) 9,

Near v Minnesota, 283 U.S. 697 (1931) 8

Terminiello v City of Chicago, 337 U.S. 1 (1948) — 4

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8

Witnesses

Gordon

→ pltf - exh - 1 ~~Pt~~ complaint
Walthall affidavit

Go Selectman
Chairman of police comm
reporter
20 yrs in the Comm
15 police
14,500 people in city
served with ex Mayor injured
on Nov. 28

What decision made - policeman
not to arrest anyone at depot -
that otherwise to fulfill police

Told Chief not to have police
at terminal
Chief told them that CORE
was sending people
@ 10:19 AM next day

He learned before their arrival
they were coming

Wedn 29 – saw Pressman
saw at least 3
Ben McCarty
Grumman Prentiss and
man from Time

objected [McCarty said AP informed that persons coming to McComb]

Wednesday morning – several groups of persons there at station
saw Bus come in
5 Negroes came off
premises not open

detached from bus tried the doors east west
entered a taxicab
much of disorder
saw no acts of disorder

Back to area several times
Did he see any actual violence – saw none
saw disturbances

About 2:00 PM – called to City Hall
Did not observe anything else

at Station

Saw unusual crowds of people —

Went back with Chief of Police — large crowd east & west of station

Chief told people to move on

Crowd obeyed slowly

no pushing

people obeyed police

~~Thursday Nov 30~~

AP said there were meeting in McComb — planned to return to McComb

— heard Physical disturbance on Wednes

who was he CORE

heard that a photographer taking pictures all day — fight between photographer & persons

were they the passengers ~~[illegible]~~ photog

About 3:00 Chief of Police told to go to Bus Station

larger group there

~~had~~ heard Negroes been ejected

did he speak with McBehel

None arrested

Guy spoke to people
got statements - ~~no arrest~~
7 men arrested next day -
assault - disturbing of peace

~~what~~ Friday Dec 1 -
Great deal occurred
did not personally observe
anything except departure
of negroes

anyone arrest the crowd

saw a man running
pell-mell northward

Police doing best to maintain
law & order.

Questioned man who was
chased

of years been causing trouble [illegible] presence of newsmen

People of city greatly disturbed

From Tues 20th police needed
assistance - several deputies & sheriff

Mayor Douglas
Mayor 1957

5 or 6 leading merchants
detrimental to their business

Frustration of Disturbance]
last 2 or 3 wks
about 3 wks ago it started —
injunction added to that lessening
of tax money

Aubrey McGehee
I.C. ~~agent~~ engineer
Cafe in station
Wife has bus station

Passengers Engineer
Wed 29th arrived about
2:00 — 2:15

Cameraman ran
Saw colored people getting
out of car
He was directly in front of door

They stopped at the door

these are the waiting room — there are the

My wife and I own this restaurant

One girl demanding service some beating + knocking on counter

Told them to go into

Never did serve colored people

Tom Gaither
Field Rep.

Jerome Smith
Ch'n of New Orleans CORE
unsalaried
Jerome Smith told him he might travel

Plt's exh-3 Gaither's card - business

Officer Smith
Eddie Smith
Police

Officer 1

Sat 'Dec' 2

3 colored passengers
Ass't Chief also in
terminal with him

2 came in had seats
1 " to ticket office

two are approached & threatened him

Another person came - same party (w/ Tom's car)

Everything quiet

Police Chief Guy

to FBI told him
people were going to the station -
~~One~~ FBI came to him &
told him of fight

Intern'l Bro of Teamsters etc v Vogt, Incorporated
354 US 284
32 Labor Cases 94,229 (1957)

Right of State to enjoin

Unions picketed - employer - "no labor dispute" ~~no way~~ unions couldn't induce some to join
Injunction granted.

before N-La-G Act (1) Truax v Corrigan 257 US 312
(2) Senn v Tile Layers 301 US 468
stranger picketing
(3) Thornhill v Alabama 310 US 88
prohibited picketing
(4) AFL v Swing 312 US 321
State can't enjoin peaceful picketing where there was no statute only common against stranger picketing

(5) Milk Wagon Drivers v Meadowmoor 312 US 287
Injunction in violence case

6 People v Schweinler 214 NY 395
28 Harv Law Rev 790

⑦ Bakery Drivers v Wohl 315 US 769

⑧ Carpenters Union v Ritters Cafe
315 US 722

Texas could grant injunc &
insulate the dispute from other
areas

In Wohl – narrow decision

[illegible]

Orders Are Filed To Remove Signs At Two Terminals

GREENVILLE, Miss. (Special)—A formal notice ordering Greenwood's Greyhound bus station to take down its segregation signs and telling the Leflore county attorney to make no attempt to enforce segregation in the terminal was filed here yesterday.

The order followed a hearing a week ago by a three-judge federal court on a Justice Department petition to order a removal of segregation signs for intrastate passengers at the terminal.

The court, composed of Fifth Circuit Court of Appeals Chief Judge Albert Tuttle of Atlanta, Fifth Circuit Judge Richard Rives of Montgomery, Ala., and District Judge Claude Clayton of Tupelo, ruled the terminal must remove segregation signs and County Attorney John B. Frasier must not attempt to enforce segregation at the terminal.

Their order was formally entered on the court record here yesterday and goes into effect when copies are served on the persons involved.

A similar notice was filed in Jackson yesterday outlawing three state segregation laws and ordering McComb officials to take down intrastate segregation signs at their Greyhound terminal.

The order filed in Jackson also came as the result of a justice Department petition for a preliminary injunction, heard last Tuesday by Tuttle, Rives and District Judge Sidney Mize of Gulfport.

Mize dissented from the majority opinion in the McComb suit and did not sign the order.

Clayton agreed to the injunction against Frasier in the Greenwood case but dissented in the injunction against the bus terminal.

Jackson Daily News
Wed. Nov. 29, 1961

Gas Blocks Integration

MCCOMB, Miss. (AP)—Several Negroes sought unsuccessfully today to use the newly desegregated white waiting room at the Greyhound bus terminal here. The doors were locked because gas had escaped from a pipe inside the room.

Five or six Negroes got off a northbound bus from New Orleans at 10:20 a.m., and walked to the door of the white waiting room, no longer designated for whites only following a federal court order. They found the doors locked.

Mrs. Eloise McGehee, the terminal agent, reported she had locked the doors for fear of danger from sparks.

The bus left without the group a few minutes later and the Negroes boarded a taxi.

A plumber arrived a short time afterward to work on the pipes.

The segregation signs were removed at bus and train terminals early today in compliance with the federal court order, but only a handful of people were standing around when the bus arrived. There had been reports a desegregation effort would be made.

The signs came down after the city council authorized the removal at a Tuesday session, which followed the formal court order banning them.

Mayor C. H. Douglas had announced earlier the city would comply with the order.

Douglas said Tuesday his plan was to throw terminals "wide open and see what happens." He said he would not use state breach of peace statutes, under which more than 300 "Freedom Riders" were arrested in Jackson, unless "somebody gets his head skinned."

A federal court at Jackson ordered McComb officials to take down segregation signs at the Greyhound bus and Illinois Central Railroad terminals.

Policemen In McComb To Enforce Integration

Four Are Arrested Following Beatings

By WALLACE DABBS
Clarion-Ledger Staff Writer

McCOMB — Mayor C. H. Douglas said Thursday McComb Police officers will enforce a federal law requiring integration of the bus and railroad terminals.

Mayor Douglas told a news conference: "We did not make the law at the local level, but it is our purpose to enforce it. We are determined to this end," he said.

Police Chief George Guy said that Negroes will not be arrested for using the white waiting room of the Greyhound bus terminal. However, he said, should violence break out inside the station, "all parties will be arrested, both white and colored."

"Our hands are tied by that injunction," Chief Guy said. He referred to a recent order handed down by a three judge federal panel forbidding interference with interstate passengers.

Thursday morning officers began patrolling the area around the terminal.

MOVE ON

"Any persons in the vicinity of these facilities who have no reason to be there will be required to move on," Mayor Douglas said.

If the Negro passengers use the white waiting room of the terminal, under the protection of local law officers, it will mark the first official de-segregation of interstate travel facilities in Mississippi.

The press conference came on the heels of violence which broke out Wednesday afternoon at the terminal when five Negroes sought service inside the white waiting room.

Douglas said police arrested four white McComb men and charged them with disturbing the peace after the fracas.

Chief Guy identified the arrested men as: Earl Ratliff, 25, Claude McKenzie, 21, Johnny Thomas, 20, and Haskell Boyd, 20.

The four have been released on $100 bonds each Chief Guy said, and the Negroes involved in the melee were notified of the arrest.

NEGROES EXPECTED

A group of Negroes is expected to arrive in McComb from New Orleans Friday in an effort to use white facilities at the terminal.

Douglas said the city was increasing its police force to "cope with the situation where our resources are attacked by a sudden influx of outside professional agitators who come with the announced intention of remaining in our city until an incident is provoked and photographed."

Guy said the normal number of the McComb Police force is 15 but an additional five who usually serve in an off-duty capacity have been called to active duty.

Douglas said, "We want the nation to know that yesterday's (Wednesday) incident was due to the fact that our police department had been restrained by a federal injunction which handicapped it in the enforcement of the law."

However, he said, he had received authority from the assistant U. S. Attorney General in Washington to have the McComb Police force resume its normal operations at the bus and railroad terminals.

ATTENDING

Attending the press conference were Douglas, Chief Guy, City Attorney Louis Alford and Norman Gillis, Jr., attorney-adviser to the City Board.

It was a peaceful afternoon in McComb Thursday with Christmas shoppers taking advantage of the warm winter sun.

There were several FBI agents, two Justice Department attorneys and two crews of national television news department representatives in McComb.

Andy Hopkins, state Sovereignty Commission representative, said he was in McComb "just observing."

The statement issued by Mayor Douglas at the press conference Thursday afternoon follows:

(1). The law regarding our bus and railroad terminals is a Federal law. We did not make it at the local level, but it is our

Continued On Page 18

Photog Won't Forget

By CHARLES M. GORDON

McCOMB — A free lance television photographer from Jackson had a wide variety of troubles in McComb Wednesday.

Johann Rush, a young former Hinds Junior College student, came to the city on a tip he might get some film he could sell Columbia Broadcasting system when a group of Negroes got here to test the situation at the bus station.

The Negroes found the doors locked and abruptly boarded a cruising Negro taxi and took off westward on Canal Street.

GAVE CHASE

Rush was anxious not to lose them. So he got in his rented car and gave chase.

In the process he turned north on South Broadway although the red traffic signal was against him and sped away post haste.

A policeman took after him and, found him at the Burglund office of Dr. James Anderson, where the five CORE agents had gone.

Rush was charged with reckless driving, improper turning and running a red light. The first charge was withdrawn by the officers when he plead guilty to the other two.

FINES AND COSTS

He was fined a total of $20 and $1 costs on the two charges, which CBS said it would pay, when that firm was contacted on long distance.

In the early afternoon he suffered a slight "beating up" at the hands of a white group he

Continued On Page [illegible]

INTEGRATION

Continued From Page 1

purpose to enforce it. We are determined to this end.

(2). We are immediately increasing our normal police force to cope with the present situation. Our Police Dept. is capable in normal times of meeting any local development, but we now find ourselves in a situation where our resources are taxed by a sudden influx of ouside professional agitators who come with the announced intention of remaining in our city until an incident is provoked and photographed.

(3). With the increased strength of our Police Dept. we are now prepared to meet these emergencies. We are requesting the public not to congregate at the bus and railroad terminals, and any persons in the vicinity of these facilities who have no reason to be there will be required to move on. We want to make it clear that the law will be applied to all persons, white and colored alike. All white persons known to have participated in yesterday's (Wednesday) trouble have been arrested and taken into custody. We are determined to suppress violence.

(4). We want the nation to know that yesterday's incidents were due in part to the fact that our police department had been restrained by a Federal injunction which handicapped it in the enforcement of the law. Today (Thursday) I received authority from the assistant United States Attorney General in Washington to have our police resume their normal operation at the bus and railroad terminal. We feel that since we now have this authority, we can adequately cope with the situation and maintain peace.

(5). McComb, known for years as "the Camellia City of America," is a beautiful ad enlightened community. Our white and colored people have long enjoyed mutual respect and friendship. We do not intend to permit this relationship to be marred by the unfortunate publicity involved in this situation."

PHOTOG

Continued From Page 1

declined to accuse formally or to try to identify.

And, while he stuck to the protective cover of the city Hall's offices all afternoon, someone broke into a rented car he was using and stole a 35 MM still camera.

Meanwhile, some persons who ad become fearful he had films the bus station trouble scene hich included them verbally orked him over at intervals in e afternoon.

le left his rented car behind sight and under police es-

JAMES M. WARD, Editor **MISSISSIPPI PUBLISHERS CORP., Publishers**
FREDERICK SULLENS, Editor, 1904-1957

McComb Affair Unfortunate, Might Have Been Prevented

There has been violence again at McComb in connection with the unending efforts of outside agitators, aided by Washington, to rip down local laws and disarm community authorities in their attempts to maintain order.

The latest incident, although not serious in nature, is unfortunate. To be sure it was not unexpected.

McComb is a good and law-respecting, growing city with a high sense of civic pride in cleanliness, industrial growth and cultural advancement.

It is strange how organized groups of outside agitators select a geographical name on a map and set into motion strange acts of conduct designed to arouse the chosen community. McComb happens to be one of those targets. It has been bearing its full load of invaders.

Some of the many invaders into Mississippi have records of unsavory citizenship but the zeal of reformers has achieved through endless national publicity an immunity for these characters and has succeeded in placing them in the roles of heroes without study.

An example of that publicity and a likely cause of McComb's latest violence came on a national television network's early morning program this week. It was a tear-jerking, sentimental propaganda piece of sobbery obviously designed to create synthetic pity for unfortunate children born of racially-mixed matings. The editorial conclusion of this TV program dealt with the necessity of ripping down more state laws on the sensitive subject of miscegenation. The program virtually advocated U. S. Supreme Court fiat action to knock down state laws in over 20 states on this question.

The fact that offspring of miscegenationist practices — as pointed out so tearfully by the TV program — creates new and more intensive race questions would indicate a strong indictment against race-mixing itself and support for existing state laws against miscegenation.

It was a perfect case of an evil, to which the state laws oppose, being compounded into a more widespread evil through the facilities of the Federal government against the wishes of the states. The network gave no opportunity for rebuttal to its conclusions and thus the publicity campaign of the experimenting crusaders wages unabated. If the state laws against miscegnation have merit, the merit goes ignored.

Widespread, one-sided presentation of such sociological traffic can do several things. It can provoke people into unfortunate action to resist further encroachments which are felt dangerous to a good community. Such presentations can graphically transmit the obvious knowledge that to surrender an inch more for the sake of appeasement only means that another round of hate, propaganda and slander is the menu for tomorrow.

Peace-loving people do not choose perpetual harassment.

Sturdy-hearted, peace-loving people are likely to repel perpetual harassment.

It is unfortunate that a television cameraman was mistreated at McComb on Wednesday afternoon.

It is unfortunate that a group of youngsters met CORE's delegation and engaged in fisticuffs, however mild in nature. But CORE, after six months of effort and over 300 sorties into Mississippi, finally succeeded in creating an incident.

It is unfortunate that a national television program has already launched another round of agitation, and only unending uneasiness lies in store for the future.

This business of pulverizing the South has become a major source material for literature. It has become a major political project. It has become a lucrative job for plate-passing professional agitators. It has gained the nation nothing but domestic black eyes and loss of global prestige.

What has been a political promise of cookies and sugarplums may end up an ovenful of rattlesnakes just about to thaw.

Either somebody with wisdom had better cut off the heat or there are deadly hatching days ahead.

Farce Of Forced Compliance

That peculiar brand of tolerance which seems to be the private province of the "liberally-minded" was in evidence again recently in an editorial in the ever-so-tolerant Washington Post newspaper.

In an editorial entitled "Farce in Mississippi," the Post put on its most facetious mask of incredulity as it exclaimed editorially: "The impertinence of a few state officials who are trying to enforce segregation in interstate travel facilities in the face of the Interstate Commerce Commission order almost surpasses belief."

Then the Post goes on to attack those state officials in Mississippi (and elsewhere) who have continued to observe local segregation statutes long after the ICC delivered its ultimatum to the individual states.

Not merely content with the usual blast at Southern State officials, the always-concerned Post then aimed its critical invective against various federal officials who have not joined in the "liberal" crusade to destroy every vestige of state sovereignty remaining throughout the country:

"Instead of overriding this lawless action, Federal District Judge Claude Clayton denied the request of the Department of Justice for an injunction against the enforcement of Mississippi's defunct segregation law."

The Post, now finding a federal judge who may disagree with the Post's own brand of political logic, now accuses the federal judges of acting improperly.

Isn't it amazing the logic our liberal colleagues possess?

They are always for use of federal power to support any position as long as that position agrees with their own, but they are quick to attack even federal officials whose judgement varies from their interpretation of any given situation.

The Post's statement: "So, the farce continues," might well be taken as even more characteristic of the mania which governs their own liberal mentality.

The attitude reveals once more that what most of the liberal community in the nation is truly seeking is not justice, not law and order dispensed under the bar of an unbiased judiciary, but total conformity and compliance with their views.

This authoritarian attitude is the very core of the contradiction in the "liberal" philosophy, a philosophy which given full rein takes on every vestige of complete illiberalism.

hrs. Nov. 30, 1961

[redacted]

McComb Expects Wave Of Riders

Disturbance Is Challenge, Say Riders

NEW ORLEANS (AP) — Five "Freedom Riders", whose attempt to desegregate a bus terminal in McComb, Miss., resulted in violence, said early today the attack would not prevent new segregation challenges in the Mississippi town.

"If anything," said Jerome Smith, 22, chairman of the Congress of Racial Equality in New Orleans, "it would increase our zeal to go back."

An angry white crowd attacked Smith and four other Negroes in the Greyhound bus depot Wednesday. The quintet—three men and two girls—returned to New Orleans early today.

"We could not hit back," said Smith in interview with The Associated Press. "It would have created chaos. We're not trying to impose our will on anyone. We're just trying to change attitudes."

"Some belligerent character told me because I was black I wasn't welcome there. I made no reply. Then he started hitting me with brass knuckles.

"He beat me and pulled me behind the counter and hit me some more."

Smith said there was about 30 whites in the depot and some of the others joined in the beating and forced him outside.

"I saw a truck passing and dove in." Later, he said, he got into a taxicab with the other four.

MOVED TOO FAST

George Raymond, 20, said the whites called him derogatory names "and then I got kicked. They ripped my coat. I jumped over the counter and got outside. I didn't get hit. I moved so fast they didn't get close to hit me."

Thomas Valentine, 22, said he got up to leave the lunch counter in the white waiting room and "that's when one guy hit me."

Several men dragged him outside, he said, and "they were twisting me around. I was trying to get in the cab, holding on to it when George pulled me in."

Neither of the girls got hit. But Doratha smith, 18, said she and Alice Thompson, 22, went to the rest room. When they came out, "it looked like everyone was being beaten.

"I was kicked in the side by the same man who hit Jerome with brass knuckles. I was pushed outside."

Jerome Smith was released from jail at Jackson, Miss., last week after serving more than two months for a breach of peace conviction stemming from a transportation terminal desegregation attempt. He is also free on $2,000 bond in New Orleans after his arrest for picketing two variety stores.

Renewed Violence May Bring Feds

McCOMB, Miss. (AP)—Reports rumbled through tense McComb today that new waves of "Freedom Riders" could be expected, despite the attack on five Negroes by a group of white youths.

The FBI has been asked to investigate the beating of the five at the McComb Greyhound bus station Wednesday afternoon, but the FBI had no comment on what action it would take.

Mayor C. H. Douglas called for a conference with the rapidly-growing press corps at 2:30 p.m. today, but would not touch on what matters might be discussed.

The bus station was quiet today with buses arriving on schedule—without any Freedom Riders—and no inkling of disturbance. There were no policemen in the terminal, but two uniformed officers watched cautiously from a short distance away.

There was no indication on the originating point of any new segregation-testing riders.

A city official who asked not to be identified said he expects the attorney general to send federal marshals into McComb — as they were in Montgomery, Ala., during racial disorders—if more violence flared.

McComb has become a center of racial disturbances in strongly pro - segregationist Mississippi since the "Freedom Rider" campaign waned in Jackson, the state capital.

Nearly 100 Negro pupils were dismissed from McComb's Berglund High School earlier this fall after they repeatedly demonstrated against segregation practices.

The five Negroes, all members of the Congress of Racial Equality, left McComb late Wednesday night under heavy police protection. They arrived in New Orleans without incident.

Their safe departure fulfilled a promise Atty. Gen. Robert Kennedy said McComb Mayor C. H. Douglas made to the Justice Department after the attack to see that they were fully protected while they remained in McComb.

The CORE members' visit to the McComb bus station came a [illegible] said it would comply with a federal court order that segregation signs outside the station must be removed.

The Negroes, three men and two women, arrived at the bus station shortly before 3 p.m. and attempted to get service at a lunch counter in the white waiting room.

"I told them that the lunch counter was a private business and I couldn't serve them," said A. P. McGehee, husband of the bus station manager.

McGehee, working at the lunch counter, told the Negroes they could use waiting room facilities but would have to be served food at the Negro counter.

"They started beating on the counter and demanding service," he said.

"Suddenly the place blew up."

Alex Gifford, managing editor of New Orleans' television station WDSU, said a group of white persons rushed into the bus station and began dragging the Negroes out. Gifford said a white man poured a hot cup of coffee down the back of one.

The Negroes fled in a taxicab.

Tom Gaither, field secretary for CORE, said Jerome Smith, 22, was the most severely beaten, receiving skull lacerations. The other Negroes were identified as George Raymond, 18; Thomas Valentine, 23; Alice Thompson, 22, and Doratha Smith, 18, all of New Orleans.

ARRESTED IN JACKSON

Smith, president of the New Orleans CORE unit, was one of more than 300 "Freedom Riders" arrested during the summer at Jackson, Miss.

Earlier Wednesday, a crowd of whites attacked freelance photographer Johann Rush, a 19-year-old Jackson resident, who said he was on assignment from the Columbia Broadcasting System.

McComb has become the center of racial disturbances in violently pro - segregationist Mississippi since the Freedom Rider assaults in Jackson transportation terminals slowed down.

Nearly 100 Negro pupils were dismissed from Berglund [illegible] School earlier this fall after they repeatedly demon[illegible]

The [redacted]
Thr[redacted], 1961

Min[redacted] To Help Preserve Segregation

GREENWOOD—Robert B. Patterson, a top Citizens' Council official, said Wednesday white "Minute Men" have organized in many southern communities to rush to the scene of racial integration attempts.

However, Patterson did not say what the "Minute Men" would do when they got to any such scene.

Patterson, executive secretary of the Association of Citizens' Councils, revealed the plan in a letter to newspapers. He declined further comment on the matter when contacted by United Press International.

It was understood the plan has nothing to do with the "Minute Men" group organized in California.

Patterson's announcement signaled an apparent change in tactics in dealing with "Freedom Riders" and other pro-integration groups who challenge segregation. Earlier, council officials had asked that citizens remain in the background and let law officers handle the situation.

But Patterson's letter said presence of "Minute Men" would "lend moral support to local law enforcement officers who may be outnumbered by the invaders."

"Community opinion can be quickly mobilized in support of any city or county official faced with an invasion of trained revolutionaries," the letter said.

It said "Minute Men" are a "cross section of the finest white citizenry in each community" who are to "peaceably assemble on short notice at any given point within their community or county to demonstrate a citizens protest against any invasion of our institutions."

He said "the key men in each organization are the seven leaders or colonels. Each of the seven telephones five captains each of whom in turn call five lieutenants. In a few minutes a substantial group can be alerted to assemble at a given point."

"This is a 'non-violent' counteraction to the organized 'non-violent law breakers,'" Patterson said.

The Citizens' Council has not publicly endorsed violence but has held that integration will bring on violence.

Clarion Ledger
[redacted]

7

McCOMB WILL COMPLY WITH ORDER TO SEE WHAT HAPPENS

McCOMB (AP)—Mayor C. H. Douglas said Tuesday McComb would comply with a Federal court order to take down segregation signs adjacent to entrances to the Greyhound Bus and Illinois Central Railroad terminals.

Douglas said: "If they say take them down, they're coming down. That's the only thing to do."

He said his plan was to throw terminals "wide open and see what happens."

Douglas said the city would not use the state breach of peace statutes, under which 312 "Freedom Riders" were arrested at Jackson, unless "somebody gets his head skinned."

Under the breach of peace law, a person may be arrested if, in the opinion of officers, his presence would tend to cause a breach of the peace.

VIOLENCE AT DEPOT

Five Negroes Ejected at McComb Station

By W. F. MINOR
(Times-Picayune Staff Correspondent)

M'COMB, Miss. — Violence flared at the Greyhound bus station here Wednesday as five young Negroes who attempted to test removal of race barriers were severely beaten and hustled out of the station by white men.

Later Wednesday city police escorted the five Negroes to the bus station and after clearing the immediate area put them on a New Orleans bound bus.

Police and sheriff's deputies then followed the bus to the state line about 15 miles south of here.

Earlier a free-lance movie cameraman who said he was on assignment for CBS television, was hit and chased by a crowd in front of the bus terminal.

The five Negroes, who arrived from New Orleans during the morning, were unable to make a test of desegregation on their arrival because the station was temporarily closed.

They returned about 3 p. m. and attempted to get service at the lunch counter in the white waiting room.

A. P. McGehee, husband of the bus station manager, who was working at the counter, told the Negroes the food service was a "private business" and that he couldn't serve them there.

CAUGHT TAXI

He told them they could use the waiting room facilities but would have to be served food at the counter for Negroes.

McGehee told police that the Negroes "started beating on the counter and demanding service."

When he was distracted for a few minutes to go to the

Cont. in Sec. 1, Page 31, Col. 1

FBI Is Asked to Investigate Mix Violence

(Special to The Times-Picayune)

WASHINGTON—Atty. Gen. Robert F. Kennedy said Wednesday "the outbreak of violence" in McComb, Miss., is a matter of deep concern. The federal bureau of investigation has been asked to make a complete investigation of all aspects of the incidents. The matter will be pursued vigorously.

"Officials of the department of justice have just talked by telephone with Mayor C. H. Douglas of McComb. We have received his personal assurance that the five Negroes who were the subject of violence this (Wednesday) afternoon will receive full and complete protection while in that city.

"Only a relatively small number of people were responsible for this inexcusable violence. We are certain that the vast majority of the people of McComb, as in other parts of the country, deplore the incident."

Earlier, National Association for the Advancement of Colored People officials had sent a wire to Kennedy urging that steps be taken to "preserve law and order and guarantee Negro citizens free and unobstructed access to travel facilities in the state of Mississippi, and in McComb in

DEPOT VIOLENCE

Continued from Page 1

ticket counter, police said, "suddenly the place blew up."

Nearly a dozen white men who had rushed into the station started punching and kicking the Negroes about the waiting room and then pushed them out the front door.

Some other white men outside the station continued the beating until the Negroes jumped into a taxi cab and left. Police arrived on the scene a few minutes after the roughness had occurred and the Negroes were gone.

No police officers were present at the bus station during the day, pursuant to orders from police Chief George Guy and Mayor C. H. Douglas.

Guy and Douglas had said earlier that the presence of officers may appear to be an indication that they would seek to enforce segregation of the waiting room facilities by police officers.

Segregation signs outside the bus station were taken down Tuesday night under the injunction order of a three-judge federal court which was served on the city officials earlier Tuesday.

Mayor Douglas said he would comply with the order and leave the bus station "wide open and see what happens."

A spokesman in the attorney general's office said officials had talked with Mayor Douglas shortly after 7 p. m.

Earlier, National Association for the Advancement of Colored People officials had sent a wire to Kennedy urging that steps be taken to "preserve law and order and guarantee Negro citizens free and unobstructed access to travel facilities in the state of Mississippi, and in McComb in particular."

The five Negroes who came here on a morning bus from New Orleans included Jerome Smith, 22, president of the CORE chapter in New Orleans; George Raymond, 18; Thomas Valentine, 23; Alice Thompson, 22, and Doratha Smith, 18.

When their bus arrived Wednesday morning, the bus station had been cleared about 15 minutes earlier because of gas fumes from a leaky hot water tank. A plumber had been called and was working on the faulty gas line when the bus came in.

Because no one was being permitted inside the station, the five young Negroes caught a cab and left.

They said afterwards they intended to catch a bus out of McComb and return to New Orleans later in the day or Thursday morning.

The cameraman who was attacked was Johaan Rush, 19, from Jackson, a former student at Hinds Junior college.

Bystanders said Rush was outside the bus station about 2 p. m. Wednesday with his camera when a white man asked him if he "wanted to take my picture." Rush reportedly said "yes, I will," and the man hit him.

Rush's jacket was torn and then he started running, with several persons chasing him.

He ran into the rear of a dress shop on Main st. and asked for police protection. Police arrived a short time later and took him to the police station.

Rush told police he did not in-

CORE 'Freedom Ride' Plans Are Told

BALTIMORE (AP)—The Congress of Racial Equality (CORE) announced in New York Wednesday that it would stage a "freedom ride" Dec. 16 along U.S. 40 between Baltimore and Wilming, Del.

At the same time, the Maryland commission on inter-racial problems and relations approved in Baltimore a new public accommodations bill to give Negroes equal service in Maryland hotels and restaurants.

A CORE spokesman in New York said about half of the 72 restaurants between Baltimore and Wilmington now serve Negroes.

12/4/61

Oil Field Worker Roughs Up Editor

J. OLIVER EMMERICH
After Sunday Attack
(AP Photo)

By ELSIE MAY CHAMBERS
Clarion-Ledger State Editor

McCOMB—J. Oliver Emmerich, 62, editor of the McComb Enterprise - Journal, was slugged by an oil field worker Sunday morning as he emerged from a downtown drug store.

Chief of Police Guy, who later arrested the man, identified him as Milton Joines Stayton, 43, of Route 3, McComb. He was charged with assault and battery, placed under $1,000 bond and ordered to appear in court Monday morning at 9 o'clock for a hearing.

Chief Guy quoted Stayton as saying that he had been reading the newspapers and listening to the radio and that he "was surprised that somebody had not whipped Mr. Emmerich before."

The Chief said that Stayton "apparently decided to do the job himself."

The incident was considered to be an aftermath of a tense week when racial violence had flared up at the local bus station over the desegregation issue.

Emmerich has said he will prosecute Stayton "to the fullest possible extent." He has been told that the man waited outside the store for an hour and a half for the editor to emerge.

The maximum penalty for assault and battery is six months in jail plus a $500 fine.

It happened just after Mr. Emmerich on his way to church had gone to the Gillis Drug Store for a cup of coffee "as he was accustomed to doing every Sunday morning," Mrs. Emmerich said.

As he came out of the store, a man not known to Mr. Emmerich stepped forward and asked him if he were responsible for all the newspaper people being in town.

Mrs. Emmerich said that her husband told the man the members of the press came of their own accord. Stayton pointed out that they were using the newspaper office as headquarters, and Mr. Emmerich explained that this was only a courtesy extended to members of the same profession.

STRUCK IN FACE

Emmerich then started to walk away, and the man hit him in the face, two or three times knocking his glasses off and cutting a small gash over one eye.

Stayton then walked away from the scene of the incident which was witnessed by a number of people, and got into a waiting car. Officers arrested him at his own home, three hours later.

An employee of the drugstore said he came to Mr. Emmerich's aid and told the attacker he ought to be ashamed of hitting a World War I veteran.

The assailant replied, "Well, I'm a veteran of the Korean War," and walked off.

CAR TRACED

Identity of the man was not known at the time of the attack, according to Mrs. Emmerich, but he was traced through a description of the car and driver who carried him away.

Mr. Emmerich, who was recently hospitalized for several weeks with a heart attack or warning, has been doing lighter duty with the McComb paper recently, Mrs. Emmerich said, and was out of town during last week's disturbances around the McComb bus station, when most of the out-of-town press representatives were in town.

Mrs. Emmerich said that her husband was feeling fine but lying down Sunday afternoon. She said that he went to a doctor and that two stitches were taken to close the wound over his eye.

Mr. Emmerich was the sixth newspaper man to be roughed up in McComb since the trouble broke out last Wednesday with the arrival of "Freedom-riding" Negroes bent on using the previously all-white facilities in the local bus terminal.

A number of newsmen were here to observe the Negroes testing the effectiveness of a Federal Court ruling order the terminal desegrated.

ge Mize Orders CORE Stop McComb Activities

Officials Charge Riders Are Provoking Violence

By TOMMY HERRINGTON
Clarion Ledger Staff Writer

CORE's 'Freedom Riders' have been temporarily halted from provoking further incidents at McComb's Greyhound bus terminal by Federal court order.

U. S. Judge Sidney C. Mize of Gulfport has granted a temporary restraining order on a complaint filed by McComb officials and Mr. and Mrs. Aubrey McGehee, operators of the Greyhound terminal.

Their complaint charges CORE (Congress of Racial Equality) "and others associated with them are sponsoring, financing and encouraging John and Mary Doe and others to come to McComb . . . in order to foment violence and provoke breaches of the peace in and around the terminals and facilities used in McComb for the transportation of passengers, mail and baggage, into through and from the city."

SERVED ON GAITHER

U. S. Marshal Hugo Newcomb served copies of the "John Doe" complaint on Tom Gaither, CORE's field representative at a Negro hotel in Jackson Sunday morning.

Attached to the complaint of the McComb officials, including Mayor C. H. Douglas and Atty. Gen. Joe T. Patterson, is a copy of the recently issued federal court injunction which restrains McComb officers from interference in any integrated use of travel terminals.

The complaint also sets out that the McGehees, operators of the Greyhound terminal, have been forced to close down the restaurant operated in conjunction with the bus terminal.

"The acts of the defendants are wilful, intentional, deliberate acts which the defendants have publicly announced to the newspaper, radio and television press media that they intend to continue," the complaint sets out.

Hearing on the temporary restraining order has been set for 9 a.m. Thursday in Jackson by U.S. Judge S. C. Mize. The restraining order was granted for a ten-day period and is designed to prevent further "rides" until the injunction request can be acted upon.

At least six "Freedom Riders" and several newsmen have been attacked in McComb since the rider campaign began last Wednesday, causing angry crowds to gather in McComb City streets.

RIDERS PUSH MIXING

CORE-led "Riders" have attempted to use the terminal facilities of McComb since their integration campaign was touched off by the order to end segregation, by two federal judges, over the objection of U.S. Judge Sidney C. Mize.

Signers of the complaint seeking the injunction include McComb officials, the bus terminal operators and members of Atty. General Joe Patterson's staff.

The temporary restraining order was issued in Gulfport Saturday around 4 p.m. by Judge Mize but copies of the restraining order were not served until Sunday morning.

In a statement telephoned to newspapers Sunday, Gaither said in part that "CORE does not feel that the right of any individual to travel in dignity can be limited."

CITES SIMILAR ORDER

He even declared that his views had been recently shared by proceedings in a federal district court in Alabama, citing that U.S. Judge Frank M. Johnson, Jr., (in Alabama) has recently dissolved an injunction similar to the one granted in the McComb case by U.S. Judge Mize.

Gaither's auto, bearing three colored McComb students who had been expelled from school, was kicked by a group of white men near the Greyhound terminal Saturday.

The Negro youths, expelled from schools after they backed a "sit-in" had ridden a bus into McComb to "test" the integration of the travel terminal.

They had departed from the terminal and proceeded to get into Gaither's automobile, parked on an adjacent street to the sta-

McCOMB

Continued from Page 1

tion, when the incident occurred.

Another student, Mike Arthur Cotton of Tougaloo Southern Christian College, was reportedly slugged several times by an unidentified white man when he went into the bus station attempting to purchase a ticket for Jackson. CORE leader Gaither said Cotton was "not seriously hurt".

FIVE TOSSED OUT

Earlier, at least five Negro "Riders" were bodily tossed out of the Greyhound station and beaten by a group of white men. The "white" and "colored" signs recently situated at entrances to the travel terminal have been painted over. Signs erected outside the station have also since been removed.

The complaint filed by McComb officials also charges damages in excess of $10,000 for the incidents of violence which have occurred.

"Agitation" by 'Riders' is calculated to continue provoking further incidents of violence in and around the bus terminal, said the complaint of McComb officials.

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Jackson Daily News
[illegible]

Station

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porters Attacked

Six Negroes Enter McComb Terminal

By W. C. SHOEMAKER
Daily News Staff Writer

McCOMB, Miss.—Six Negro Freedom Riders marched into and out of the previously-white waiting room of the Greyhound bus terminal here this afternoon while a crowd watched but made no attempt to stop them.

A few minutes later the crowd, mostly young McComb men, turned its anger on two New Orleans television cameramen, not immediately identified.

One cameraman was chased from the bus station to the city hall a block away. From city hall, the group then took after another who darted into a building two blocks away and escaped. One television man was identified as John Naylor of ABC.

Meanwhile, Haskell Boyd, 20, who was arrested earlier for an attack on three magazine members, was released from jail to seek medical aid. He told officers he broke his hand in the four-youth attack on the trio.

The Freedom Riders, who drove away in a car with two Negro men after testing the white waiting room facilities, were expected to return to the bus terminal to test a federal court injunction a second time and then continue to Jackson for a test there.

After spending about two or three minutes inside the station the Freedom riders went to the car in which they drove away with the two Negro men.

As newsmen walked toward the car to try to interview the riders, several persons began shouting [illegible]

[illegible] the station [illegible] alleyway at the [illegible]

Police allowed no traffic on the street fronting the terminal during the time the bus was at the station.

The incident occurred in front of White's Sport Shop next door to the Enterprise-Journal newspaper in downtown McComb.

Uhrbrock said he was struck four or five times in the face and was shoved through a plate glass window. Fentress said he was also hit while Underwood said he was only pushed.

The three said they were walking up the street together when four men accosted them and asked who they were, where they were from and what they were doing. Uhrbrock and Underwood said they answered and one of the group told them "my God, look's like this is nationwide."

Fentress said he told them only that he was "here on business" and that one member of the group answered him "your business is our business" and the scuffle started.

Uhrbrock suffered a swollen lip but the other two apparently were uninjured.

Uhrbrock was among newsmen beaten in Montgomery May [illegible] during "Freedom Rider" [illegible] in the Alabama capital.

Police rounded [illegible] and the [illegible] of McComb [illegible] Negroes Wednesday at the bus terminal. He was free on [illegible] bond when today's scuffle occurred.

Mayor C. H. Douglas and Police Chief George Guy had vowed to prevent trouble at the bus terminal. This morning, however, when a bus from New Orleans, on which "freedom riders" were expected, arrived about 100 curious townpeople gathered around the station. No one left the bus.

A few minutes later about three blocks away four young white men scuffled with reporters and photographers from Time and Life magazines. Two of the magazine reporters suffered bruises and police jailed a McComb man they identified as one of their four assailants.

Reporters involved in the fracas were Don Uhrbrock, a Life photographer from Miami; Don Underwood, Life writer from Miami; and Simmons Fentress, of Atlanta, a Time correspondent.

Boyd admitted to police that he participated in the scuffle.

City Judge Robert William Brumfield immediately revoked a 30-day suspended sentence Boyd had received two weeks ago on a resisting arrest charge and sent him to jail.

U. S. Marshal Hugh Newcomb of Jackson in McComb today said he was here "just observing." He said he knew of no plans to bring a force of federal officers into the city.

A bus bearing six avowed CORE integration testers was due here before 2 p. m. from Baton Rouge.

Thomas Peete of Shreveport, leader of the six Negro delegation, said they planned to test transportation facilities both in McComb and in Jackson.

Jerome Smith, who had a

Continued on page 2

NEWSMEN LED AWAY AFTER McCOMB ATTACK

Shown above are three newsmen attacked today in McComb by white youths. They are, from left, Don Uhrbrock, Simmons Fentress, and Don Underwood. Policeman is Slim Elmore.—Daily News-AP Wirephoto.

MSS SEDFRE

DOWLING, PVT. RICHARD - COURT MARTIAL, 1968

Box [illegible]
Folder 15

State Historical Society of Wisconsin

Please Retain Original Order

Sept. 25, 1968

MEMORANDUM
TO: MARVIN RICH FROM: ZALA FORIZS

Re: Private Richard Dowling
Ft. Cmapbell, Kentucky
Special Court Martial of
Sept. 20, 1968

On or about Sept. 16, 1968, the Workers' Defense League contacted us in referrence to the special court martial of Private Richard Dowling, stationed at Fort Campbell, Kentucky. WDL asked us to either represent this client or to find civilian counsel for him. The defendant had been charged on four trumped up counts (one quite serious--conspiring to do bodily injury to an officer) as a means of harassment for his challenging the justification of the Vietnam policy at an indoctrination session.

In response to this request we made several calls throughout Kentucky. We finally contacted an attorney in Nashville, Tennessee, who offered to take the case if he could get the court martial adjourned to a time convenient for him. We telegramed an affidavit supporting his request.

The adjournment was not granted, but as a result of our efforts and pressures he was given a three month suspended sentence. The sentence as a matter of course is much more severe in such cases, but it is the opinion of Joe Pierpont of WDL, Dowling's military counsel, and Rowland Watts, a member of the SEDFRE board of directors, that it was because of our efforts that such an unusually light sentence resulted.

The defendant is extrememly pleased with the results, both because of his personal interest and because he feels that our efforts in his case will be a deterrent to future abuses of justice in Fort Campbell.

Rowland Watts is equally delighted and has personally thanked and congratulated SEDFRE for its work. I feel that the money and effort that went into this case was amply justified by the results.

OFFICE OF THE JUDGE ADVOCATE
Fort Campbell, Kentucky

Re: PRIVATE RICHARD DOWLING

Special Court Martial to be
held September 20, 1968, at
Headquarters and Company
A day room, 68 Maintenance
Battalion, Fort Campbell
Kentucky

AFFIDAVIT

CARL RACHLIN, Esq., being duly sworn, deposes and says:

1. I have been engaged in an effort to obtain civilian counsel for Private Richard Dowling.

2. In attempting to find civilian counsel for Private Dowling over the past week and a half, I have been in contact with nine (9) attorneys in Kentucky, having had several conversations with three (3) of them.

3. On the evening of September 18, 1968, my office finally contacted Whiteworth Stokes, Esq., an attorney in Nashville, Tennessee. Mr. Stokes has offered to represent Private Dowling if his special court martial, scheduled for September 20, 1968, were postponed. Mr. Stokes has indicated that he will be in New York on September 20, 1968 and, therefore, would not be able to represent Private Dowling on that date.

4. Wherefore, I respectfully request that the special court martial of Private Richard Dowling, scheduled for September 20, 1968, be postponed until such time as Mr. Stokes might be able to

represent him, understanding that such period of postponement would not be unreasonable in length.

CARL RACHLIN, Esq.

Sworn before me this
19th day of September, 1968

NOTARY PUBLIC

[N.D.]1

GENTLEMEN:

You have the charges against me and you have some information regarding them. I will restate the charges tell you briefly why I should or should not plead guilty on each.
I will then give you a short resume on the events leading to this situation.

Charge 1

Failure to get out of bed as ordered by Sergeant First Class Bledsoe. I did not get out of bed but, rather, countered him with a request to see mental hygiene. I did this because this was the third incident of the day, (I had already been told by Major McReynolds that I was going to Leavonworth for five years for charges two and three) and I hoped to op out by convincing them that I was mentally unbalanced. They refused to let me go that evening. I'd better plead guilty.

Charge 2

Failure to properly execute a facing movement. After a series of drills, involving only PFC Garret and myself, we got bored and started clowning. I'd better plead guilty. They have us on film.

Charge 3

This incident occured just after charge 2. As part of the sub-standard squad, a squad in which tose individuals alledgedly not disciplined, trained, or intelligent enough to come up to the standards of the company are placed, I was engaged, along with five other fellows in putting up pup tents on Saturday afternoon while chaperoned by Non-Coms.
Just prior to this I had been read my rights by Major McReynolds and he had informed me that before the week was over he would have enough charges to put Garret and I in Leavonworth for five years. And if this failed he added, "when we get to Vietnam he will have us put in an infantry unit."
When ~~first~~ sergeant Bledsoe gave me the order to "tear the tent down
I walked over and yanked it out of the ground."

First Sergeant ~~Bledsoe~~ Doyle said immediately, "Dowling, if that tent is torn I will add another courtmartial charge to you."

PFC Garret can fill you in as to how the examination was conducted. I was not present as I had beem whisked away to the orderly room.

All the defense witnesses are in accord, though, on the fact that Sergeant Bledsoe had said "tear the tent down, not "stride the tent," which is the proper command.

They will all testify that if I did tear the tent I did it inadvertently.

Charge 4

This charge was brought against us~~s~~ some eight days later. During this time we had been yanked out of the goon squad, confined to ~~the~~ ~~fxx~~ a room, and escorted to chow and back to our room. Because we were also harassed quite a lot during this time, we responded by bending the ear of the post inspector general.

On this particular day I had just recieved a minor hazing by three NCO's. They had me at attention in the latrine while one, Sergeant Kohn, informed me that, because of my unamerican attitudes,, communist, hippie, pacifist, coward, nigger-lover, etc that it is quite likely that some one is going to stick a pistol in my mouth and blow my brains out. (I now think I can verify this, because one of the NCO's present has defected to our side because he is now awaiting court martial for being awol the day of Garretts trial.)

He has told me that he will cooperate with us as far as he can with out appearing to collude.

I let the old man rave. Occasionally adressing remarks to him via the mirror, the walls, the urinal, etc "Say urinal, etc" Everything I said was harmless; the text is coming.

After this incident I returned to my room. Garrett had just arrived. He had been downstairs for a phone call.

At this time Spec. 5 Bowman came in with a broad grin on his face, (he had attended the hazing) and said, "Dowling, if you and Garrett have such a big organization behind you, why haven't you brought some smoke down on us yet?"

Before, in the latrine, I had countered Sergeant Kohn (via the artifacts) by telling him there was a whole network of people like me, many more than he could ever hope to imagine, and, if he defected to our side we would give him a chance to work up through the ranks. Stuff to blow a lifers mind.

I answered Spec 5 Bowman thusly, "when our organization decides to move you'll know it."

I knew that his question referred to the lack of lawyers and congressman running through the company offices in our defense. In my answer I implied that he might see some soon.

I then began razzing him as to the reason for his presence in our room. More or less slighting his intelligence and his lack of ability to make good conversation. I further pointed out his undesirability to us as a visitor. He was grinning like an idiot, as he always does in these situations, when Sergeant Thorton came to the door. At no time did I make a threat.

Garrett, who was in a rare silence all the time, warned me to shut up as was our policy with two NCO's present. We were aware that he or I could slip up and say something that could be held against us---so it was automatic for us to cease conversation. In this case, for me to cease conversation. I did; Bowman left, as did Thorton, and we began a chess game.

Garrett has since been convicted of this same charge. This was done on the strength of Bowman's testimony even though Thorton, his original collaborator and now defector, was awol that day.

Sergeant Thorton is now prepard to testify, as he states, that he heard me make the alleged remarks but that they were said in a joking manner. I may even get a statement fxx from him in which he nullifies his original statement if he can do it with out making himself a liar.

HOW I GOT IN THIS AFFAIR

About the second or third Saturday in July, Major McReynolds gave a command information class in which he supported our Vietnam intervention. THEN HE OPENED THE CLASS FOR QUESTIONS. Garrett and I, who hardly knew each other at the time, destroyed his position easily.

I'm sure your aware how easy that must have been. We did it in a polite and responsible manner. Attacking first his Dullesian view of world affairs; then citing a number of political personalities with years of governmental service who were opposed to the war, an~~d fina~~lly our finally our personal p positions and that of our xxxx peers.

He was unnerved.

About a week later he gatherd the whole company back in the same room to hear his brainstorm for dealing with the dissident elements of the company, who he claimed were either screwups or unamerican.

His idea. A goon platoon, not for harassment but for discipline and training. "Just like basic all over again he said."
Garrett commented critically on the idea to the majors chargrin. The following week he was among those enered in the platoon. For the following two weeks it was obvious to everyone that this goon platoon was not for training or disciplining, but an excuse to harass dissidents.

A number of men have written to their congressmen. I will get you statements from them if you like.

Payday rolled around and I, like a budding alchoholic, hit the nearest bar. There I ran into the first sergeant. He asked me if I was a communist and a sagious discussion ensued. During this discussion first sergeant Doyle told me that he and the major had pegged Garrett as a "Black Agitator." Probably trained to disrupt companies like this, and that he was trying "to get the niggers in the company all stirred up."

With this confidential disclosure in mind I decided to openly side with Garrett.

Later that week major McReynolds called another meeting solely for the purpose of denouncing Garrett as a "devout follower" of Stokely Carmichael, (what's wrong with that) a shirker of his duties, and a trained agitator. Also a "bad Guy."

Though he did not mention Garretts name, everyone knew, of course, who was the recipient of these derogatory remarks. When the major concluded his harangue, Garret rose to defend himself. The major ordered him to sit down, saying, "I will talk to you later."

I raised my hand. After some hesitation, the major called on me.

I asked him loudly, "what specific actixxxx has this individual this individual had committed that would lead you to regard him in such a manner?" He told me to sit down.

A week later I was put in the goon platoon. The first day there I recieved my first three court martial charges.

REASONS YOU MAY NOT DEEM IT FEASIBLE TO DEFEND ME

Between the ages of 15 and 18 I was arrested a series of time. Possesion of alchohol, fighting, and a 2nd degree buglary charge. I was convicted of the buglary charge and spent four months and twenty days in jail. Two years later I reentered a plea of not guilty and the case was dismissed.

As it stands I have no convition, under law, on this charge. Several professional attorneys advised me that this would not xxxxx hinder my desire to teach or to practice law.

If this would affect the bond adversely I do not want you to defend me. I can continue working behind the scenes and have to date done so, I think, very affectively. I can make this a bond company.

My younger brother, a vietnam veteran, was just court xxxx martialed for refusing to obey a direct order. He ~~was~~ is a medic and is ~~f~~ a total anti-war activist. He was with the two young men from for Ord who got convicted for passing out anti-warr pamphlets there.

The day they were picked up he was awol tryig to get himself committed at Sa Francisco Lettermens Hospital because he started taking drugs while in vietnam. My folks are one hundred percent behind him but they are not well enough to know about my my case until it is finished.

My brothers case, howevern would make a classic bond story and I know that he will cooperate with you.

Your representative and I have a brilliant solution to the saluting and sir problem in the service. We will present it to you in another letter.

GENTLEMEN, the decision is yours.

Richard T. Dowling

WITNESS STATEMENT
(AR 195-10 - TB PMG 3)

PLACE 142d Trans Co (Acft)(DS) Ft Campbell, Ky.	DATE 12 Aug 68	TIME 1630 hrs	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Bowman, Robert W.	SOCIAL SECURITY ACCOUNT NO. 186-36-3319		GRADE SP6E6

ORGANIZATION OR ADDRESS
142d Trans Co (Acft)(DS) Fort Campbell, Kentucky 42223

SWORN STATEMENT

I, Robert W. Bowman, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

RWB Private Richard Dowling was brought up to the latrine to get a shave. Upon shaving himself, he was told to blouse his boots. Instead of doing this he started back downstairs. I told him to return three times. However, he continued downstairs. ignoring my orders. SFC Carlton Bledsoe was my witness. RWB

SFC Carlton Bledsoe was giving Private Dowling and PFC James Garrett dismounted drill and they would not do what they were ordered to do. When they were given the command of RIGHT FACE, they would do just the opposite and so on.

Later we returned Private Dowling to the bay where he refused an order to go into the latrine and start cleaning. He then went to his bunk and laid down refusing another order to get up and move into the latrine. SFC Bledsoe was my witness.

Both SFC Bledsoe, SGT Donald Thornton, and myself ordered him off the bunk. He refused the orders saying that he could not understand any orders from us. RWB

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT RWB	PAGE 1 OF 2 RWB PAGES

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF___ TAKEN AT___ DATED___ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE___OF___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

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WITNESS STATEMENT
(AR 195-10 - TB PMG 3)

PLACE 142d Trans Co (Acft)(DS) Ft Campbell, Ky.	DATE 12 Aug 68	TIME 1825 hrs	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Dhornton, Donald	SOCIAL SECURITY ACCOUNT NO. 261-70-4715		GRADE SGT E5
ORGANIZATION OR ADDRESS 142d Trans Co (Acft)(DS) Fort Campbell, Kentucky 42223			

SWORN STATEMENT

DT I, Donald Thornton, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

Private Richard Dowling was ordered by SFC Carlton Bledsoe, SP6E6 Robert Bowmam, and myself to go into the latrine. After given this order, Private Dowling laid down on his bunk. He was again ordered by myself, SP6E6 Bowman, and SFC Bledsoe to clean the latrine. He refused that order saying that he couldn't understand any orders given by us.

Private Dowling went into the latrine after given orders by SFC Bledsoe, SP6E6 Bowman, and myself. He was in the latrine about five (5) minutes and returned to his bunk. Again Private Dowling was ordered by SP6E6 Bowman, SFC Bledsoe, and myself to get up and clean the latrine. His remark was, "I can't understand your orders". SFC Hall came into the bay and ordered Private Dowling to get off of the bunk and clean the latrine. Private Dowling's response was the same.

Private Dowling would not march with the other troops. He was ordered by myself to march in a military manner. He refused to do this. He was given a command of RIGHT FACE and would do an ABOUT FACE. He was given the command of ABOUT FACE and would do a LEFT FACE, etc.

Private Dowling was given an order by me to tear down a tent. Private Dowling at this time grabbed the tent at the top and gave a hard jerk and pulled the tent down. He said that this was the way he thought it was to be taken down. First Sergeant Doyle told Private Dowling that he would pay for this tent if it was torn. In inspecting the tent, First Sergeant Doyle found about a six (6) inch tear in the tent. This was witnessed by SP6E6 Bowman, SFC Bledsoe, and myself. DT

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT DT	PAGE 1 OF ~~2~~ 1 PAGES DT

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WITNESS STATEMENT
(AR 195-10 - TB PMG 3)

PLACE Fort Campbell, Kentucky 42223	DATE 16 Aug 68	TIME 1600 hours	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME THORNTON, Donald (NMN)	SOCIAL SECURITY ACCOUNT NO. 261-70-4715		GRADE SGT E-5
ORGANIZATION OR ADDRESS 142d Transportation Company (Aircraft)(Direct Support)			

SWORN STATEMENT

I, Donald Thornton, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

DT During the evening of 14 August 1968, on the thrid floor of the 142d Transportatio Company at Fort Campbell, I, Sergeant Donald Thornton, RA 14 867 978 entered the room of PFC Garrett and PVT Dowling to borrow a cigarette from SP6 Bowman, who told me he was going there earlier. I walked into the room and heard PFC Garrett say to SP6 Bowma "You don't know what you are getting into." SP6 Bowman asked PFC Garrett, "What do you mean?". PFC Garrett said, "We have people on the outside that will look out for us and they know what's taking place in the company". PFC Garrett then said, "The only way that the NCO's and Major Mc Reynolds can stay alive is for the NCO's to convince Major Mc Reynolds to apologize to us in front of the company for personal insults and charges made against us". PVT Dowling then said, "It's too late for that now, we will get revenge." PVT Dowing said, "It can be arranged to have explosives put in your cars". PFC Carrett then said, "They can even get to your loved ones." The PFC Garrett asked SP6 Bowman, "When are you going on leave?" SP6 Bowman said, "It's none of your business." PFC Garrett then said, "Don't lie to me because I can find out when you go on leave, and we can get you." PVT Dowing then said, "It's too late for the NCO's and Major Mc Reynolds to be helped. They'll be annilated in such a way that no one could prove we had anything to do with it. There are plenty of people around here to take care of it. There are 200, well maybe 250 people on post that believe the way we do." SP6 Bowman then asked, "Dowing, where are these people at? PVT Dowing told SP6 Bowman, "I know two in HQ and A Company, and two in Post Library. There are others here on Post that believe the way we do." DT

//////////////////////////////////END OF STATEMENT//////////////////////////////////

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT DT	PAGE 1 OF 1 PAGES

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WITNESS STATEMENT
(AR 195-10 - TB PMG 3)

PLACE Fort Campbell, Kentucky 42223	DATE 16 Aug 68	TIME 1600 hours	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME BOWMAN, Robert Wayne	SOCIAL SECURITY ACCOUNT NO. 186-36-3319		GRADE SP6 E6
ORGANIZATION OR ADDRESS 142d Transportation Company (Aircraft)(Direct Support), Fort Campbell, Kentucky 42223			

SWORN STATEMENT

I, Robert Wayne Bowman, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

RWB On the evening of 14 August 1968, on the third floor of the 142d Transportation Company, barracks, Fort Campbell, I SP6 Robert W Bowman, RA13842030, entered the room of PFC Garrett and PVT Dowling to find out if they wanted to go see the Inspector General. They were talking to each other and I told them, "At Ease", until I found out the necessary information. PFC Garrett said, "You don't know what you are getting into". I asked him, "What do you mean by that." PFC Garrett replied, "We have people on the outside who are looking out for us and know whats going on in the company." PFC Garrett continued, "The only way the NCO's and Major Mc Reynolds can stay alive, is to have the NCO's convince Major Mc Reynolds to apologize in front of the whole company for pressing charges against me and Dowling." The PVT Dowling said, "It's too late for anything like that, Carrett and I will go vengence." Then PVT Dowling said, "Your cars can be rigged with some sort of explosives." PFC Garrett then said, "There's a better way, we can even take care of your loved ones." PVT Dowling then said, "It's too late for you NCO's and Mc Reynolds to be helped, and you'll be annialated so that no one will ever suspect us." PFC Garrett then asked me, "Are you going on leave?" I said, "It's none of your business." PFC Garrett then said, "Don't lie to me, they can find you anywhere, antime." PVT Dowling then said, "There's plenty of people around to do this job, there are at least 200 on Fort Campbell, there's two in the post library and some in HQ and A Co." RWB

//////////////////////////////END OF STATEMENT///////////////////////////////

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT RWB	PAGE 1 OF 1 PAGES

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WITNESS STATEMENT
(AR 195-10 - TB PMG 3)

PLACE 142d Trans Co (Acft)(DS) Ft Campbell, Ky.	DATE 12 Aug 68	TIME 1840 hrs	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Bledsoe, Carlton	SOCIAL SECURITY ACCOUNT NO. 250-50-4575		GRADE SFC E7
ORGANIZATION OR ADDRESS 142d Trans Co (Acft)(DS) Fort Campbell, Kentucky 42223			

SWORN STATEMENT

I, Carlton Bledsoe WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

CJB On the 10th of August 1968 at 1300 hrs, I was assigned as substandard platoon sergeant. On the training schedule the platoon was to pitch tents at 1300 hrs. I told the platoon to get their equipment for pitching tents so we could get started. Private Dowling pulled off his shirt to get his equipment out of his laundry bag. He said he had to take his hairt off because it restricted him. He got all of his equipment out but put his tent rope back in the bag then he started to put the other items in it. I told him to get his rope and then he put all of his equipment on the floor. He got his rope. After this he said he could pick up his equipment better if he moved it back next to the fan. Private Dowling moved all of his field equipment back to the fan, one piece at a time. At this time I told Private Dowling to pick up his shelter half, poles, pegs, and rope. We then started outside to pitch tents. Private Dowling dropped all of the items he had for the tent. I told him to pick them up. He asked if that was a lawful order. He would not pick them up until I told him it was a lawful order. On the way down the stairs, Private Dowling again dropped all of the items for the tent. I told him to pick them up and he again asked if that was a lawful order. I told him it was and he picked it up.

After we were outside of the barracks I had them to get in a formation. I then gave the squad a RIGHT FACE, but Private Dowling and PFC Garrett did a LEFT FACE. I gave them a LEFT FACE movement and Private Dowling and PFC Garrett did a RIGHT FACE. I then had Private Dowling and PFC Garrett to move out of the squad. I started giving them different commands and every time I would give a command Private Dowling and PFC Garrett did a different movement. I gave commands for about ten (10) minutes. During this time they did not make any of the movements I commanded.

After this the squad started to pitch tents and Private Dowling and PFC Garrett worked together. After much delay the tent was up but not tight. I told Private Dowling to move one of the ropes so the tent would be tight and I also told him where to move it. He refused to pull the peg up. After a delay he used an entrenching tool and beat the peg into the ground and bent the peg by doing this. After the tent was up and tight, SGT Donald Thornton told Private Dowling to take the tent down. At this time Private Dowling walked up and started jerking the tent down by the rope. He pulled the tent pegs out of the ground by pulling on the tent top. After this I checked and found Private Dowling had torn one of the shelter halves and broke two of the tent poles.

The First Sergeant, SFC John Doyle, came out to observe the squad and he hoticed that Private Dowling had not shaved so he sent him in the barracks to shave. After Private Dowling finished shaving, I told him to get in uniform before he went back out. He had his shirt-tail out, sleeves of his shirt were rolled up, and his trousers were not bloused. He refused to get in uniform. I gave him a lawful order to get in

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT CJB	PAGE 1 OF 2 PAGES

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DA FORM 1 JAN 68 2823

STATEMENT *(Continued)*

uniform and Private Dowling again refused. He then turned and walked away. SP6E6 Robert Bowman was a witness to this.

About 1630 I had the squad outside giving them dismounted drill. Private Dowling refused to march with the squad. He stood there and yelled at myself and SP6E6 Bowman. Private Dowling was very disrespectful to us, his NCO's. After the supper meal I had the squad in formation and told them to go to their bay. Private Dowling went into the 2nd floor bay and I had to go get him and order him to go up to his bay.

Later the squad had barracks cleanup. I assigned Private Dowling to help clean the latrine. He refused to go. I gave him a lawful order to go and Private Dowling again refused. SP6E6 Bowman was a witness to this. After about fifteen (15) minutes Private Dowling went to the latrine and laid down. Sgt Thornton told him to get up and he refused. Sgt Thornton came and got me. I told him to get up and he did. Then Private Dowling went back to the bay and laid down on his bunk. I gave Private Dowling a lawful order to get up from his bunk and refused to do this. SP6E6 Bowman and Sgt Thornton were witnesses to this.

At 2045 hrs. Private Dowling said he wanted to go worship. I told him he could. I would send a NCO with him. He then said he didn't want to go then, but he said that he wanted to go at 2145 hrs. I went to see if he wanted to go worship at 2145 hrs. and he said he did not want to go.

The next day, Sunday the 11th of August 1968, Private Dowling was off duty to go worship. At 1400 hrs. he said he wanted to go worship. I told him he could go and I would send a NCO with him. He then said he didn't want to go. He said he may want to go later, maybe tonight. CJB

AFFIDAVIT

I, Carlton Bledsoe HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Carlton J. Bledsoe
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this ____ day of ____, 19__ at ____

142d Trans Co (Acft)(DS)
Fort Campbell, Kentucky 42223
ORGANIZATION OR ADDRESS

(Signature of Person Administering Oath)

142d Trans Co (Acft)(DS)
Fort Campbell, Kentucky 42223
ORGANIZATION OR ADDRESS

(Typed Name of Person Administering Oath)

(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT CJB

CLASS OF SERVICE
This is a fast message unless its deferred character is indicated by the proper symbol.

WESTERN UNION
TELEGRAM
®

SYMBOLS
DL = Day Letter
NL = Night Letter
LT = International Letter Telegram

23

The filing time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

1968 SEP 19 PM 8 43

UDA436 (40)(58)CTB357 14
CT NHA411 COLLECT FT CAMPBELL KY 19 537P CDT
CARL RACHLIN ESQ Collect 185
164 MADISON AVE 4TH FLOOR NYK
YOUR MSG TO OFFICE OF STAFF JUDGE ADVOCATE DLVD 415P CDT 19 SEP 68
WU FT CAMPBELL KY
(551).

[redacted]

[redacted]

SF1201(R2-65)

[Sept 19, 1968]

OFFICE OF THE JUDGE ADVOCATE
Fort Campbell, Kentucky

Re: PRIVATE RICHARD DOWLING

Special Court Martial to be
held September 20, 1968, at
Headquarters and Company
A day room, 68 Maintenance
Battalion, Fort Campbell
Kentucky

AFFIDAVIT

CARL RACHLIN, Esq., being duly sworn, deposes and says:

1. I have been engaged in an effort to obtain civilian counsel for Private Richard Dowling.

2. In attempting to find civilian counsel for Private Dowling over the past week and a half, I have been in contact with nine (9) attorneys in Kentucky, having had several conversations with three (3) of them.

3. On the evening of September 18, 1968, my office finally contacted Whiteworth Stokes, Esq., an attorney in Nashville, Tennessee. Mr. Stokes has offered to represent Private Dowling if his special court martial, scheduled for September 20, 1968, were postponed. Mr. Stokes has indicated that he will be in New York on September 20, 1968 and, therefore, would not be able to represent Private Dowling on that date.

4. Wherefore, I respectfully request that the special court martial of Private Richard Dowling, scheduled for September 20, 1968, be postponed until such time as Mr. Stokes might be able to

represent him, understanding that such period of postponement would not be unreasonable in length.

CARL RACHLIN, Esq.

Sworn before me this
19th day of September, 1968

NOTARY PUBLIC

Docket No:

Date: 8-22-68

Name: Richard F B Dowling & James C Garett

Adress: 142 Transport Co 58 Mnt Batt . **Zip:**

Phone No: ~~606~~ 502 **Referred by:** Andrew STApp

Description of case:

CO Major McReynolds
Dowling - Officer lecture VN failure
Opposed questions
bomb plot = threatening lives
of NCO
↓
made remark like "we ought to blow up bastards"
Garret - failure to stand at attention.
Tom call what charges.
Ft Campbell Ky = restricted
American Serviceman's Union - Charges

Action taken:

Entered by:

Referred to Rowland Watts:

Referred to Cooperating Attorney: Rachlin

Sept. 25, 1968

MEMORANDUM
TO: MARVIN RICH FROM: ZALA FORIZS

Re: Private Richard Dowling
Ft. Cmapbell, Kentucky
Special Court Martial of
Sept. 20, 1968

On or about Sept. 16, 1968, the Workers' Defense League contacted us in referrence to the special court martial of Private Richard Dowling, stationed at Fort Campbell, Kentucky, WDL asked us to either represent this client or to find civilian counsel for him. The defendant had been charged on four trumped up counts (one quite serious--conspiring to do bodily injury to an officer) as a means of harassment for his challenging the justification of the Vietnam policy at an indoctrination session.

In response to this request we made several calls throughout Kentucky. We finally contacted an attorney in Nashville, Tennessee, who offered to take the case if he could get the court martial adjourned to a time convenient for him. We telegramed an affidavit supporting his request.

The adjournment was not granted, but as a result of our efforts and pressures he was given a three month suspended sentence. The sentence as a matter of course is much more severe in such cases, but it is the opinion of Joe Pierpont of WDL, Dowling's military counsel, and Rowland Watts, a member of the SEDFRE board of directors, that it was because of our efforts that such an unusually light sentence resulted.

The defendant is extrememly pleased with the results, both because of his personal interest and because he feels that our efforts in his case will be a deterrent to future abuses of justice in Fort Campbell.

Rowland Watts is equally delighted and has personally thanked and congratulated SEDFRE for its work. I feel that the money and effort that went into this case was amply justified by the results.

[N.O.]

In reference to the conversation of Pfc Garrett, Pvt Dowling, Sp5 Bowman and myself (Sgt Thornton) on the threat of Maj McReynolds and the NCO of the 142nd TC.

I, "Sgt Thornton" do not thing that this was a serious threat and believe that Pfc Garrett and Pvt Dowling was using this conversation as a Joke and a way to harrass Sp6 Bowman and myself (Sgt Thornton)

[N.D.]

On the date of which the incident leading to the charge of willful distrution of government occurred private Dowling and I were members of an extra training squad. The squad was essentially a tool used by the Company Commander to punish and give extra duties to those individuals who did not possess the proper military bearings or attitudes. In Private Dowlings and my case it was Anti-Vietnam attitudes. In order to make this squad legal it was called extra training, not punishment or extra duty.

When the incident occurred we were being trained on how to put up a pup tent. Since this was "training PVT Dowling put in oral request to have a demonstration by N.C.O's in charge however they refused his request. After a half hour I and PVT Dowling succeeded in putting up tent and Sgt Bledsoe gave I and Dowling command to "tear down the tent" at which time Dowling walked up to tent and yanked on the top causing tent to fall down. At this time 1st Sgt Doyle inspected tent for evidence of damage and informed Dowling that if there was he would prosecute him for willful distrution of Govt. Property however he found no evidence of damage. Dowling was ordered into Orderly room and I was ordered to fold up tent which was composed

Senator Joseph CLARK
Military Affairs

of two halves. While I was folding up one portion or half 1st Sgt. Doyle and Sgt Bledsoe detect six inch tear in it. I told them it was my tent half and that the tear was already there. 1st Sgt Doyle and Bledsoe also picked up several damaged tent poles.

The second charge resulted from incident which occurred on Aug 14, 1968 during the evening. That evening Sp/6 Bowman entered room in which I and PVT Dowling were restricted with big grin on his face and asked Dowling why, if he had such a big organization behind him, weren't they bringing wrath or smoke down on them. To this Dowling replied "when our organization moves you will know it. Dowling and Bowman joked back and forth and then Sgt Thorton entered roomed at which time I turned to Dowling and told him not to joke with N.C.O's when there are two together. During conversation however no mention was made of a bomb threat which Dowling was later accused of making.

PVT Dowling and I had never been in trouble in the Company until we voiced our Anti-Vietnam War views in a Command Information class in which the company Commander open the Discussion on Vietnam. After that we were called trouble-makers and bad guys and I latter was framed for court-martial which they attempted to give to me the day after the charges were read to me and before I had had adequate legal council. I refused court-martial on those grounds and later charge was dropped. Two other charges were later fabricated and I received a court-martial to which charges I was found guilty. The verdict was so ridiculous that even the prosecuting lieutenant told me personally "I hope you appeal the hell out of this case."

As a conclusion I can truthfully say both private Dowling and I are being oppenly persecuted and discriminated against by our Company Commander and other N.C.O's following his instructions.

In addition to the persecution I have ~~received~~ and been called a highly trained professional black agitator, subversive ect. By my C.O. and 1st sergent

James C. Garrett

[N.D.]

The trial is now set for the 20th of September at Headquarters and A Company day room, 68 Maintenance Battalion, Ft. Campbell, Ky.

Private Dowling is awaiting a special court martial because of four charges made against him. There are only two charges that I think he has a chance to beat. One of them is willfully destroying government property. In this case Private Dowling was given the order to tear down the tent. The correct command is to "strike th tent" but in Army slang "tear down the tent" is sometimes used. After receiving this order Private Dowling went up to the tent and grabbed the tent at the top and proceeded to yank it out of the ground. A few minutes later platoon sergeant Bledsoe inspected the tent and found a small tear at the bottom of it and also two tent poles that were broke PFC Garrett claimed that the tear had already been in the tent but Sergeant Bledsoe claimed it was a fresh tear. I am basing my case on the premise that Private Dowling did not willfully intend to destroy government property even though he was wrong in his method of taking down the tent.

The other charge he might can beat is that he threatened to put explosives in the cars of the NCO's and Major Mc Reynolds if Major Mc Reynolds did not apologize to Private Garrett and himself. There are two witnesses to this charge. One is Specialist 6 Bowman and the other is Sergeant Thornton. At the trial of Private Garrett for this same charge Specialist 6 Bowman testified that he felt the threat was serious, Sergeant Thornto did not testify at that trial because he supposedly went AWOL that morning. Private Dowling and Garrett claim that they never made this threat at all. Sergeant Thornton has sense returned and I asked him if he had changed his mind about any of his previous testimony. He still claims that Dowling and Garrett said what he put in his testimony against them but he is now ready to state that he thought the conversation was more of a joke and that he ~~don~~ does not consider Dowling and Garrett to be violent individuals.

Lt. Robert L. White
Defense Counsel

~~The trial is scheduled for Tuesday - the third of September. I have requested a one week postponement but do not know at this time whether it will be accepted or not.~~

The trial is to be held the 20th of September no matter whether Dowling has civilian counsel or not. ~~according to Col.~~

WDL - [N.D.]

① possible cooperation re: due process.

— ① Muslim - Ft Dix
— held in stockade
— only wants

Pvt Rowland LABEET FORT DIX

② refused to be inducted
JOHN Phyton BLACK
— ~~habeas corpus~~ already
show cause

③ Anthony POLASI -
— C.O. not granted status
— did not refuse induction
court marshal

Staff Judge Advocate in Ft. Campbell
500-750

Vetrans Union referred
~~to~~ WDL.

James C. GARRET — (WHITE)

RICHARD F. DOWLING — (BLACK)

CHARGED W/ BOMB DATE

ANDREW STAP.
Vetrans Union

DUE, PATRICIA STEPHENS V. TALLAHASSEE THEATRES, INC. - CASE,
1963

Box 36
Folder 20

State Historical Society of Wisconsin

Please Retain Original Order

Tallahassee Theater Injunction Case

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF
FLORIDA. TALLAHASSEE DIVISION

No.

PATRICIA STEPHENS DUE, JOHN DUE, GLORIA SMITH and JULIUS F. HAMILTON, Plaintiffs, vs. TALLAHASSEE THEATRES, INC., a Florida corporation; BEACH THEATRE, INC., a Florida corporation; LESLIE PENDLETON; W. P. JOYCE, as Sheriff of Leon County, Florida; ARVAH B. HOPKINS, as City Manager of the City of Tallahassee; HUGH E. WILLIAMS, JR., J. W. CORDELL, SAM TEAGUE, DAVIS H. ATKINSON, and GEORGE S. TAFF, as City Commissioners of the City of Tallahassee; and the CITY OF TALLAHASSEE, a municipal corporation of the State of Florida, Defendants.	:	COMPLAINT

The Plaintiffs, by their undersigned counsel, for their Complaint against the Defendants allege the following:

1.

JURISDICTION:

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1343(3).

2.

PLAINTIFFS - CLASS ACTION:

Plaintiffs bring this action in their own behalf as Negro citizens of the United States and on behalf of all other Negro citizens of the United States, which Negro citizens are similarly situated and affected with reference to the matters here involved. The members of this class are so numerous as to make it impracticable to bring them all before this Court. There being common questions of law and fact and a common relief being sought, as hereinafter more fully appears, this action is brought as a class suit under Rule 23A of the Federal Rules of Civil Procedure. The members of this class are fairly and adequately represented by the named plaintiffs herein.

3.

DEFENDANTS:

(a) TALLAHASSEE THEATRES, INC., is a Florida corporation and is the owner and in lawful possession of the Florida Theatre in Tallahassee, Florida, a movie theater which caters to the public generally.

(b) BEACH THEATRE, INC., is a Florida corporation and is the owner and in lawful possession of the State Theatre in Tallahassee, Florida, a movie theater which caters to the public generally.

(c) LESLIE PENDLETON is the manager of the Florida and State Theatres, duly designated as such manager by the aforesaid defendant corporations.

(d) W. P. JOYCE is the Sheriff of Leon County, Florida.

(e) ARVAH B. HOPKINS is the City Manager of the City of Tallahassee.

(f) HUGH E. WILLIAMS, JR., J. W. CORDELL, SAM TEAGUE, DAVIS H. ATKINSON and GEORGE S. TAFF are the elected officials of the City of Tallahassee and constitute the governing body thereof, known as the City Commission of the City of Tallahassee.

(g) The CITY OF TALLAHASSEE is a municipal cor poration of the State of Florida.

4.

ORIGINAL TICKET PURCHASE:

On or about January 23, 1963, Plaintiffs, PATRICIA STEPHENS DUE and JULIUS F. HAMILTON, paid for and procured tickets to the Florida Theatre and requested admission on the same basis as all other Americans. The ticket agent refused such admissions and told the Plaintiffs to present their tickets to the cashier for a refund. LESLIE PENDLETON, defendant manager, called the police and in their presence defendant manager asked Plaintiffs to leave. When Plaintiffs agains tendered their tickets and requested admission to the movie, Plaintiffs were arrested and jailed.

5.

At all times pertinent hereto, said Plaintiffs were quiet, orderly and peaceable and were refused admission and required to leave solely by reason of their race and color.

6.

After the police arrested said Plaintiffs, said police took Plaintiffs' tickets from them by the use of brutal force.

7.

Thereafter, the CITY OF TALLAHASSEE dismissed the charges against said Plaintiffs.

PEACEFUL PICKETING:

8.

On or about May 20, 1963, each and every Plaintiff herein approached the aforesaid movie theaters and requested tickets, whereupon defendant corporations and LESLIE

PENDLETON refused to sell them tickets of admission solely on account of Plaintiffs' race and color.

9.

Following the aforesaid refusal to sell Plaintiffs tickets of admission, said Plaintiffs, in conjunction with other Negro citizens of the United States, demonstrated on the public sidewalk in front of said theaters, expressing in an orderly and peaceful manner their disagreement with and opposition to the apartheid policy of defendant corporations and defendant manager.

10.

On or about May 30, 1963, the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, in a cause styled TALLAHASSEE THEATERS, INC., a Florida corporation, and BEACH THEATRE, INC., a Florida corporation, versus PATRICIA STEPHENS DUE, et cetera, et al., being Case No. 18863, In Chancery, entered certain Orders, attached hereto and made a part of this Complaint as "Exhibit A," prohibiting, inter alia, Plaintiffs and the class they represent from peaceful picketing and from seeking entrance to said movie theaters.

11.

Plaintiffs did not, in fact, perform any of the acts prohibited by the aforesaid Orders of the Circuit Court except peaceful picketing as hereinabove described and seeking entrance to said movie theaters by and through the purchase of tickets in the same manner as white persons were doing.

12.

As a consequence of Plaintiffs' attempts to secure admission to the said movie theaters through peaceful picketing and the purchase of tickets as hereinbefore described, Plaintiffs were arrested by defendant, W. P. JOYCE, and/or his agents, servants and/or employees and detained in jail until their hearing before the aforesaid Circuit Court for contempt on May 31, 1963.

13.

On or about May 31, 1963, the aforesaid Circuit Court found that Plaintiffs were not guilty of civil contempt and modified its previous Orders (which Modification is attached hereto and made a part of this Complaint as "Exhibit B") so as to continue restraint upon any unlawful interference with defendant corporations' business but so as to discontinue restraint upon peaceful picketing, reasonable demonstration, and seeking of admission to the theaters on the same basis as white persons.

14.

On or about May 30, 1963, Plaintiffs and the class they represent were approaching the said movie theaters in a quiet, orderly and peaceable group for the purpose of seeking admission on the same basis as white persons, but were still many blocks from the theaters, when the police, under the orders of and pursuant to the policies of defendants as hereinafter more fully described, attempted to stop any later peaceful demonstration by dispersing the aforesaid group of persons by the use of brutal force and by arresting a number of the group including Plaintiffs herein.

CLAIM ONE

RACIAL DISCRIMINATION IN PRIVATE PLACES OF PUBLIC ACCOMMODATION:

15.

Defendants, TALLAHASSEE THEATRES, INC., and BEACH THEATRE, INC., maintain and operate the aforesaid movie theaters under a license required and granted by the State of Florida.

16.

Defendants, TALLAHASSEE THEATRES, INC., BEACH THEATRE, INC., and LESLIE PENDLETON, refused and continue to refuse to sell Plaintiffs tickets of admission to the said movie theaters and refuse to admit Plaintiffs entrance to said theaters solely on account of their race and color.

17.

Defendant Sheriff, City Manager, City Commissioners and CITY OF TALLAHASSEE pursue and enforce a policy of enforcing white citizens of the City of Tallahassee to maintain and operate private places of public accommodation on a racially segregated basis, and said Defendants, acting under color of law, require peace officers of the City of Tallahassee to enforce and effectuate the aforesaid policy by dispersing through any and all means or else arresting and jailing all Negroes attempting to secure non-segregated service in private places of public accommodation.

18.

The acts of the Defendants aforesaid deprivated Plaintiffs of their rights to equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States; deprived

Plaintiffs of their rights to make and enforce contracts for admission to the theaters under Revised Statutes, Section 1977 (42 U.S.C.A. §1981); deprived Plaintiffs of their rights to purchase and hold personal property, i.e., tickets of admission, under Revised Statutes 1978 (42 U.S.C.A. §1982); and deprived Plaintiffs under color of State law, custom and usage of their rights, privileges and immunities under the U. S. Constitution and laws to attend private places of public accommodation on the same basis as white persons, as hereinbefore set forth more specifically.

CLAIM TWO

PEACEFUL PICKETING AND DEMONSTRATIONS:

19.

Plaintiffs re-allege and adopt each and every of the foregoing allegations.

20.

Defendants, and each of them, deliberately and intentionally prohibited Plaintiffs and the class they represent from publicly expressing their opinion concerning the unconstitutionality and immorality of refusing them admission to private places of public accommodation solely on account of their race and color and from publicly seeking such admission in a non-discriminatory manner through peaceful picketing and demonstrations as hereinbefore set forth more particularly.

21.

The acts of the Defendants aforesaid deprived the Plaintiffs of their rights of freedom of speech, peaceable assembly and association, peaceable petition for a redress of grievance, of the equal protection of laws, due process of law and the privileges and immunities of State citizenship guaranteed by the First and Fourteenth Amendments to the Federal Constitution and denied to the Plaintiffs the privileges and immunities of Federal citizenship guaranteed by Article VI, Section 2, of the Federal Constitution; and in addition deprived Plaintiffs of equal rights under the law to make and enforce contracts for admission to the theaters, to purchase and hold personal property in tickets for admission, and to be free from the deprivations set forth hereinbefore under color of law in violation of Revised Statutes, Sections 1977, 1978 and 1979 (42 U.S.C.A Sections 1981, 1982 and 1983), respectively.

CLAIM THREE

WRONGFUL COURT ORDERS AND WRONGFUL DETENTION THEREUNDER:

22.

Plaintiffs re-allege and adopt each and every of the foregoing allegations.

23.

As a direct result of Plaintiffs' attempts to procure tickets of admission to the said theaters, Plaintiffs were arrested and detained in jail until their hearings before the Circuit Court of Leon County, Florida, for contempt on or about May 31, 1963, which arrests and detentions were made by and under the authority of defendant, W. P. JOYCE, pursuant to the wrongful Orders of said Court prohibiting peaceful picketing and reasonable demonstrations (as set forth in Exhibit A to this Complaint).

24.

The aforesaid Orders, et cetera, were made at the demand of Defendants, TALLAHASSEE, THEATRES, INC., and BEACH THEATRE, INC., in Case No. 18863, as set forth more particularly hereinbefore, and said Orders, as also the action afore-mentioned, the arrests, the jailings and the dententions herein described, all constitute State action in enforcing a discriminatory policy on the part of each and every Defendant herein.

25.

The aforesaid wrongful Orders and detentions deprived Plaintiffs of freedom of speech, freedom of assembly and the right to peaceably petition for a redress of grievance, of the equal protection of the laws, due process of the laws and the privileges and immunities granted to all citizens of the United States under the Fourteenth Amendment to the Constitution of the United States, and of rights of property and contract without due process of law in violation of the Constitution of the United States, and Revised Statutes, Sections 1977, 1978 and 1979 (42 U.S.C.A. Sections 1981, 1982 and 1983).

CLAIM FOUR

POLICE BRUTALITY:

26.

Plaintiffs re-allege and adopt each and every of the foregoing allegations.

27.

After arresting Plaintiffs, PATRICIA STEPHENS DUE and JULIUS F. HAMILTON, on January 23, 1963, the police officers took Plaintiffs' tickets from them by the use of brutal force, as hereinbefore alleged, pursuant to the policy and orders of Defendants, and each of them, to prevent and prohibit Plaintiffs from seeking and/or gaining admission to private places of public accommodation without regard to race and color.

28.

On or about May 30, 1963, police officers of the City of Tallahassee, pursuant to the policies and orders of Defendants and each of them to enforce and effectuate segregation in private places of public accommodation as hereinbefore more particularly set forth, attempted to disperse Plaintiffs and members of the class they represent and to prevent said persons from peaceful demonstrations and peaceful seeking of admission to said theaters by the use of brutal force, including but not limited to physical violence and teargassing.

29.

At the time of the aforesaid police brutality on or about May 30, 1963, Plaintiffs and other members of the class they represent were many blocks away from the said movie theaters.

30.

The Defendants and each of them thereby deprived Plaintiffs of their rights to due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and in violation of the Revised Statutes, Section 1979 (42 U.S.C.A. §1983), as well as Plaintiffs' rights to receive like punishment, penalties, pains as white persons under Revised

Statutes, Section 1977 (42 U.S.C.A. §1981).

CLAIM FIVE

CONSPIRACY:

31.

Plaintiffs re-allege and adopt each and every of the foregoing allegations.

32.

Defendants, and each and all of them, as set forth more particularly hereinbefore, conspired under color of State law, custom and usage to deprive Plaintiffs and the class they represent of the equal protection of the laws and of equal privileges and immunities under the laws in that Defendants conspired to prevent and prohibit Plaintiffs from seeking and/or gaining admission to private places of public accommodation, from exercising their Federal Constitutional rights of free speech and assembly and petition, and from securing equal justice and due process by the police and judicial branches of the State, which conspiracy sought to and did deny Plaintiffs the foregoing rights solely on account of their race and color, all in violation of the equal protection and due process clauses of the Constitution of the United States and in violation of Revised Statutes, Section 1980 (42 U.S.C.A. §1985).

33.

Defendants, and each of them in concert with each and all other defendants, pursuant to and in furtherance of the aforesaid object of the aforesaid conspiracy, did cause Defendant Sheriff as well as City of Tallahassee policemen, firemen, and other agents, servants and/or employees to be ready and prepared to disperse Plaintiffs and the class they represent by any means, including the use of brutal force, and to arrest and jail and detain said persons for their exercise of Constitutional rights of free speech, assembly and petition as well as their rights to seek non-discriminatory admission to the aforesaid movie theaters on or about May 30, 1963, in accordance with and directly under the wrongful Order of the aforesaid Circuit Court of Leon County but before and prior to the time when the aforesaid Order was signed, filed and entered, thereby injuring Plaintiffs by depriving them of their civil rights as hereinbefore set forth.

34.

Defendants, and each of them with each and all other Defendants in concert, pursuant to and in furtherance of the aforesaid object of the aforesaid conspiracy, did cause City of Tallahassee policemen, firemen, and other agents and/or employees to deprive, prevent and prohibit Plaintiffs and the class they represent from exercising their Constitutional rights of free speech, assembly and petition as well as of admission to private places of public accommodation without regard to race and color by the use of brutal force and other methods not according to due process of law, thereby injuring Plaintiffs by depriving them of their civil rights as hereinbefore set forth.

WHEREFORE, the Plaintiffs, and each of them, demand judgment against the Defendants, jointly and severally, as follows:

(a) That this Court enter a preliminary injunction, pending a final disposition of this case, and thereafter a permanent injunction, restraining and enjoining the Defendants, and each of them, and servants, agents, employees and successors in office, from refusing to sell tickets of admission to the said movie theaters to Plaintiffs and the class they represent on the same basis as to persons of the white race, and from encouraging, assisting, aiding, abetting or forcing such prohibited refusal.

(b) That this Court enter a preliminary injunction, pending a final disposition of the case, and thereupon a permanent injunction, restraining and enjoining the defendant City Commissioners and officials, and each of them, and their servants, agents and successors in office, from using their powers and prerogatives under color of law to encourage, assist, aid, abet and force private citizens to discriminate against Plaintiffs and other Negroes in places of public accommodation solely by reason of their color.

(c) That this Court award costs to the Plaintiffs and such other, additional and alternative relief as the Court may deem just and equitable in the premises.

And Plaintiffs further demand judgment against the Defendants, and each of them, jointly and severally, except the CITY OF TALLAHASSEE, as follows:

(d) Actual damages in a sum in excess of Ten Thousand Dollars ($10,000.00).

(e) Punitive damages in a sum in excess of Ten Thousand Dollars ($10,000.00).

Herbert Heiken, Edwin Marger
TOBIAS SIMON, HOWARD W. DIXON
and IRMA ROBBINS FEDER
Attorneys for Plaintiffs
~~223 Southeast 1st Street~~
~~Miami 32, Florida~~

By: ____________________
763 Arthur Godfrey Rd.
Miami Beach, Florida

MSS
46

SEDFRE

DUKES, DAVID et. al. VS. FLORIDA, MADISON COUNTY 1965
(PUBLIC ACCOMODATION: SEGREGATION AT CHERRY LAKE RECREATIONAL FACILITIES)

Box 36
Folder 21

State Historical Society of Wisconsin

Please Retain Original Order

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID DUKES, a minor,
by Mrs. Mamie Dukes, his
mother and next friend

ELTON MARSHALL, JR., RANDOLPH MARSHALL,
both minors, by Lizzie M. Marshall,
their mother and next friend

WILLIE JAMES FRAZIER, a minor,
by Nellie M. Hamilton, his
mother and next friend

IRENE SMITH, a minor,
by Queen Smith, her
mother and next friend

and
DOROTHY JEAN HANKINS, a minor,
by Mrs. Alberta Hankins, her
mother and next friend

Individually and as
Representatives of a class,

Plaintiffs

vs. CIVIL ACTION NO. ___

MADISON COUNTY, FLORIDA, a
municipal corporation, c/o
Kirk Pittman, Chairman of the
County Commissioners

THE COUNTY COMMISSIONERS
OF MADISON COUNTY, FLORIDA,
a body politic, through its
president, Kirk Pittman

KIRK PITTMAN, as member and
Chairman of the Madison
County Commissioners

THE MADISON COUNTY BOARD OF PUBLIC
INSTRUCTION, c/o Griffin Bishop,,
Superintendant of Public Instruction

GRIFFIN BISHOP, as Superintendant
of Public Instruction

corrected (see complaint)

THE CHERRY LAKE CIVIC CLUB, INC.,
c/o its managing agent,
T. B. Walther

T. B. WALTHER, individually and
as person in charge of business
of The Cherry Lake Civic Club

THE UNITED STATES OF AMERICA,
c/o the United States Attorney

Defendants

ORDER FOR HEARING ON APPLICATION FOR TEMPORARY INJUNCTION

Good cause appearing therefore and upon consideration of the verified Complaint filed herein:

IT IS HEREBY ORDERED THAT the defendants herein appear before this Court on the 17 day of Aug, 1965, at the hour of 10:00 o'clock of the said day, at the United States Courtroom, Jax, Florida, to show cause, if any they have, why a temporary injunction should not issue against them as prayed for in plaintiffs' complaint, a copy of which is to be served herewith.

Dated August ____ , 1965.

U. S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

DAVID DUKES, a minor,
by Mrs. Mamie Dukes, his
mother and next friend

ELTON MARSHALL, JR., RANDOLPH MARSHALL,
both minors, by Lizzie M. Marshall,
their mother and next friend

WILLIE JAMES FRAZIER, a minor,
by Nellie M. Hamilton, his
mother and next friend

IRENE SMITH, a minor,
by Queen Smith, her
mother and next friend

and
DOROTHY JEAN HANKINS, a minor,
by Mrs. Alberta Hankins, her
mother and next friend

Individually and as
Representatives of a class,

Plaintiffs

vs.

CIVIL ACTION NO. 65-277-Civ-J

MADISON COUNTY, FLORIDA, a
municipal corporation, c/o
Grover Cone ~~Kirk Pittman~~, Chairman of the
County Commissioners

THE COUNTY COMMISSIONERS
OF MADISON COUNTY, FLORIDA,
a body politic, through its
president, Kirk Pittman

Grover Cone, Coleman Richardson, J. Surles and Kelly Bailey

KIRK PITTMAN, as member and
Chairman of the Madison
County Commissioners

COMPLAINT

THE MADISON COUNTY BOARD OF PUBLIC
INSTRUCTION, c/o Griffin Bishop,,
Superintendant of Public Instruction and Chairman, J. Phillips,
T.P. McCloud & [illegible].

GRIFFIN BISHOP, as Superintendant
of Public Instruction

THE CHERRY LAKE CIVIC CLUB, INC.,
c/o its managing agent,
T. B. Walther

T. B. WALTHER, individually and
as person in charge of business
of The Cherry Lake Civic Club

THE UNITED STATES OF AMERICA,
c/o the United States Attorney

Defendants

Plaintiffs complain of the defendants and for cause of action allege that:

1. Jurisdiction of this Court is invoked under the Fourteenth Amendment of the Constitution of the United States; Title 28 of the U. S. Code, sections 1331 (a), 1343 (3), 1343 (4), 1357, 2201, 2202, 2281; and Title 42 of the U. S. Code, sections 1481, 1983, 1985 (3), 1988, in that:

a) The action arises under the Constitution of the United States, and the amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

b) It is an action to redress the deprivation, under color of state law, custom and usage, of rights, privileges, and immunities guaranteed by Amendment Fourteen to the Constitution of the United States, and by statutes, including the Civil Rights Act of 1964.

c) It seeks a declaration of rights as to which there is an actual controversy; and

d) This is a proceeding for an injunction restraining defendants from continuing or maintaining any practice, policy, or custom of withholding, denying, attempting to deprive or otherwise interfering with the rights of plaintiffs and others similarly situated to equal and integrated access to a public facility which is owned by the county of Madison, Florida, to wit: recreational facilities at Cherry Lake (described below).

2. Plaintiffs bring this action in their own behalf and on behalf of others similarly situated pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure. There are common questions of law and act affecting the rights of other Negro persons who are deprived of or threatened with the loss of their rights of equal protection of the laws on account of their race and color by being denied equal utilization of public facilities which are owned, operated, or managed by or on behalf of the state or subdivision thereof. The members of said class are so numerous as to make it impractical to bring them all before this Court. A common relief is sought. The interests of said class are adequately represented by the plaintiffs, all of whom are members of it.

3. Plaintiff, David Dukes, is a Negro citizen and resident of Madison County, Florida. He is a minor of 18 years of age, and is suing by his mother and next friend, Mrs. Mamie Dukes. Plaintiffs, Elton Marshall, Jr., and Randolph Marshall, are Negro citizens and residents of Madison County, Florida. They are both minors, of 15 and 16 years, respectively, and are suing by their mother and next friend, Lizzie M. Marshall. Plaintiff, Willie James Frazier, is a Negro citizen and resident of Madison County, Florida. He is a minor of 16 years of age, and is suing by his mother and next friend, Nellie M. Hamilton. Plaintiff, Irene Smith, is a Negro citizen and resident of Madison County, Florida. She is a minor of 18 years of age, and is suing by her mother and next friend, Queen Smith. Plaintiff, Dorothy Jean Hankins, is a Negro citizen and resident of Madison County, Florida. She is a minor of 19 years of age, and is suing by her mother and next friend, Mrs. Alberta Hankins.

4. The public facility here in question consists of a parcel of land and beach containing 2.15 acres, more or less, in the northeast corner of Section 33, Township 3 North, of Madison County, Florida, and is designated as Unit A-15 on Key Plat May of Cherry Farms (1937) filed in the Office of the Recorder of Madison County on December 3, 1945. Said public facility will hereafter be referred to as "Cherry Lake."

5. "Cherry Lake" contains the following public facilities: 1. Swimming beach, 2. Soft drink dispensor, 3. Piers with diving board, 4. Dressing rooms and rest rooms, 5. Picnic tables, 6. Parking area, 7. Trees and grass for picnicing.

6. Prior to August 19, 1946, "Cherry Lake" was owned by the United States of America through its wholly owned corporation, "Cherry Lake Inc.". On or about that date the land was conveyed by the United States, acting through Cherry Lake Inc., to the Madison County Board of Public Instruction. The deed to said defendant contained the following language:

> "...to have and to hold the said property, the improvements thereon unto the said Grantee, its successors and assigns, so long as the said property is used for educational, recreational, and other related community purposes and for no other purpose.
>
> Upon the breach of any part of the aforesaid conditions, or upon abondonment of the property or cessation of use for the purposes set out herein, the Grantor may elect to re-enter

upon the property and terminate the estate herein quitclaimed, and in this event, the Grantee will, upon demand, execute and deliver to the Grantor a quitclaim deed covering the aforesaid property."

7. Plaintiffs are informed and verily believe that Cherry Lake Inc. has been dissolved, and that an agency of the United States, namely, the Farmers Home Administration is the legal successor to Cherry Lake Inc.

8. Plaintiffs are informed and verily believe that the land has been leased by the County of Madison, Florida, through its Board of Public Instruction, to the Cherry Lake Civic Club Inc., hereinafter referred to as "Civic Club," a corporation. The Civic Club now holds itself out as the possessor and proprietor of the land and beach of "Cherry Lake."

9. The defendant, County of Madison, Florida, is a municipal corporation and the defendant, County Commissioners of said County is a body politic, each of which defendants is an instrumentality of the State of Florida, and each of which defendants has supervisory and control functions over the affairs of said County, including the affairs of its Board of Public Instruction. The plaintiffs are informed and believe that the defendant County has a direct financial interest in the operation and maintenance of Cherry Lake by defendant "Civic Club."

corrected to include members

10. The defendants Kirk Pittman, as ~~a~~ member and Chairman of defendant County Commissioners has similar responsibilities and powers to those described in the preceeding paragraph.

11. The defendant, Madison County Board of Public Instruction,

corrected to include members

is an instrumentality of the State of Florida, which, as the plaintiffs are informed and believe, has a direct financial interest in the operation of the "Civic Club" and has an ownership interest in Cherry Lake; and as the plaintiffs are further informed and believe, Cherry Lake is being operated and maintained for and on behalf of said defendant Board by the "Civic Club."

12. The defendant, Griffin Bishop, in his capacity as Superintendant of Public Instruction, is an officer of the State of Florida, and has a duty to assure that all the property and facilities of the defendant Board of Public Instruction are utilized for public, lawful purposes.

13. The facilities of "Cherry Lake" are open to members

of the general public of the white race upon payment of a nominal fee of about fifty cents (50¢) per car entering the said premises.

14. The defendants, "Civic Club" and T. B. Walther, the person in charge of its business, acting for themselves and on behalf of the defendants County, County Commissioners, and Board of Public Instruction, refuse to permit members of the general public of the Negro race to utilize the facilities of "Cherry Lake."

15. On or about July 18, 1965, the plaintiffs, in the company of various other persons, most of whom were members of the Negro race, drove to the entrance of "Cherry Lake" for the purpose of utilizing its facilities and, in particular, its swimming beach.

16. Defendant T. B. Walther, then and there refused to permit plaintiffs, or any member of the group accompanying them, to enter upon the premises of "Cherry Lake" or to use its facilities. He accomplished said refusal both orally and physically, by blocking said entrance with automobiles; and he was assisted by numerous other white persons, whose names are, to plaintiffs, unknown.

17. Said refusal was on the sole ground of plaintiffs's race or color; and if they had been of the white or Caucasian race, unaccompanied by members of the Negro race, they would have been admitted upon payment of the previously-mentioned nominal fee.

18. As plaintiffs are informed and believe, T. B. Walther was and is the duly authorized agent of defendant Civic Club, and his refusal to permit plaintiffs or other Negro persons to enter was pursuant to the policies of said Civic Club and pursuant to specific instructions from said Civic Club to him.

19. The defendant County of Madison and the other defendants, acting under color of law in their official capacities, have been and are enforcing a policy, practice and custom of discrimination against the plaintiffs and their class because of race, in the utilization of Cherry Lake, and have deprived plaintiffs of privileges and immunities granted to every citizen, in violation of the Fourteenth Amendment of the United States Constitution and of Title III of the Civil Rights Act of 1964.

20. By leasing or otherwise relinquishing possession of Cherry Lake property in such a way that Negro citizens, including plaintiffs, are denied access to its facilities, the County of Madison and the other agencies and officers of the -

State of Florida named herein as defendants have discriminated against plaintiffs and members of their class in violation of the Fourteenth Amendment to the United States Constitution, section 1983 of Title 42 of the United States Code, and Title III of the Civil Rights Act of 1964.

21. By the aforesaid surrender of possession and denial of access to Negro citizens, the defnedant Board of Public Instruction has breached the conditions of the deed to it; and the United ~~Stat~~ States of America is made a party hereto to answer to its resulting interest in the "Cherry Lake" premises.

22. The plaintiffs and their class will suffer irreparable injury unless the discrimination herein complained of is ~~not~~ enjoined forthwith; and they have no adequate remedy at law.

WHEREFORE, plaintiffs pray judgement as follows:

(1) That a hearing be had at the earliest practicable date and, after said hearing, that an injunction issue pending the final outcome of this litigation, enjoining and restraining all of the defendants, their officers, agents, employees, attorneys and successors in office, and those in active concert or participation with them, from denying access to "Cherry Lake" to Negro persons, or from imposing any condition on their use thereof except that heretofore imposed on white persons, namely, that they pay an entrance charge of fifty cents (50¢) per car entering "Cherry Lake."

(2) That upon final hearing of this cause:

a) The Court continue the aforesaid injunction permanently (or issue an injunction of like force, if no temporary injunction was issued); and

b) That the County Commissioners and other defendants which are agencies or officers of the State of Florida be enjoined from selling, assigning, transferring, or otherwise disposing of said Cherry Lake facilities, or from doing any act which will prevent its use as a public facility open to Negro citizens on the same conditions as white persons,

c) That the lease or other document or arrangement whereby the defendants "Civic Club" and T. B. Walther hold or claim any rights in "Cherry Lake" be declared contrary to public policy and void,

d) That "Cherry Lake" be declared to be a public facility of the State of Florida,

e) That the County Commissioners, and other defendants which are agencies or officers of the State of Florida, and their successors in interest and in office, be enjoined from permitting or granting any party, person or persons, or organization the right to use the Cherry Lake facilities in any manner whatsoever which shall result in discrimination against any person because of race or color.

f) For damages of all defendants in the sum of $50,000, the costs of this action, and reasonable attorneys' fees as shall be determined by the Court.

(3) In the alternative to the injunctive relief prayed for in (2) above, that the Court declare that absolute title to Cherry Lake has re-vested in the United States, and order issuance of a deed accordingly.

(4) For such other relief as may be just and proper in the premise.

State of Florida)
) SS:
County of ________)

The undersigned, being first duly sworn, deposes and says that he has read the above Complaint, and the facts set forth therein are true.

____

Subscribed and sworn to before me this ____ day of August, 1965.

____
Notary Public

My commission expires:

____

corrected
in filed
copy

John D. Due, Jr.
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Tallahassee, Florida

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New York 38, New York

Attorneys for Plaintiffs

MSS SEDFRE

ESSEX CO. (N.J.) BLDG. + CONSTRUCTION TRADES COUNCIL et al. VS. RICHARDSON, GEORGE C, et al.
1963

State Historical Society of Wisconsin

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Rev. 3/1/61
Typed 4/23/62

BOARD OF EDUCATION
DEPARTMENT OF BUSINESS ADMINISTRATION
31 GREEN STREET
NEWARK 2, NEW JERSEY

* * * * * * * * *

CONTRACT

THIS AGREEMENT made the 29th day of May in the year one thousand nine hundred and sixty-two between the BOARD OF EDUCATION OF NEWARK IN THE COUNTY OF ESSEX, a corporation of the State of New Jersey (hereinafter called the Board), party of the first part, and Arthur Venneri Company, a corporation of the State of New Jersey, having its principal office and place of business at 300 North Avenue East, Westfield, New Jersey,

(hereinafter called the Contractor), party of the second part.

WITNESSETH, that the Board and the Contractor, in consideration of the mutual convenants and agreements herein contained, agree as follows:

1. The Contractor does hereby agree to provide all the labor and materials and to perform all of the work required for, and to complete the

General Construction work at the Barringer High School.

to the satisfaction of the Board's Business Administrator, and according to and in compliance with the requirements of the plans and specifications prepared therefor by
Robert H. Fava, Architect
30 James Street
Newark, New Jersey

Whenever the office of the Board's Business Administrator is vacant, the Board's Superintendent of Schools, shall, for the purposes of the within agreement be deemed to be the Board's Business Administrator.

2. The aforesaid specifications and all general conditions, bulletins and addenda prepared for the Board in connection therewith, and the instructions to the bidders applicable to this contract, are on file in the office of the Board's Business Administrator and are hereby made a part hereof. The term "specifications" as used in this contract shall be deemed to include such general conditions, bulletins, addenda and instructions to bidders, and all of the provisions thereof. The plans and specifications applicable to this contract are hereby made a part hereof, and are either annexed hereto or have been identified with markings or signatures of representatives of the Contractor and filed in the office of the Board's Business Administrator. The term "plans" as used in this contract shall not apply if in fact plans have not been prepared to accompany the specifications. If any provision of the within contract conflicts or is inconsistent with the provisions of the specifications, the provisions of the contract shall govern. If any provision in the instructions to bidders conflicts or is inconsistent with any of the provisions in any other part of the specifications, the provisions of the instructions to bidders shall govern.

3. The contractor agrees to do his work and to perform his agreements hereunder subject to the supervision, direction, requirements and orders of the Board's Business Administrator or his representatives, and in conformity thereto and in accordance and compliance therewith. If the plans and specifications mentioned above have been prepared by an architect, the architect shall be deemed to be the representative of the Board's Business Administrator in the direct day to day supervision of the work unless and until others have been designated by the Board to act in the place and stead of such architect.

No major instruction or direction to the Contractor shall bind the Board unless approved in writing by the Board's Business Administrator; and it shall be the obligation of the Contractor to ascertain without delaying the progress of his work whether such approval is or has been given. The decisions of the Board's Business Administrator as to the quality, acceptability and fitness of any part of the work done, or to be done, or of the materials used or to be used in connection therewith as to the meaning of the plans and specifications and any part thereof, and as to all other questions relating to the obligations of the Contractor hereunder shall be final and binding upon the Contractor. If an architect has been designated by the Board in connection with the supervision of the work, such decisions of the Board's Business Administrator shall be made upon consultation with the architect. All work and materials of the Contractor shall be subject to the approval of the Board's Business Administrator, and shall be done and installed at such time and places and by such methods and in such manner and sequence as the Board's Business Administrator may require. The Contractor shall employ no equipment, materials, or methods to which the Board's Business Administrator objects, and except as herein otherwise provided, shall remove no equipment, materials, or other facilities from the site of the work without the permission of the Board's Business Administrator. All questions, disputes, or doubts which may arise in the performance of this contract shall be submitted forthwith by the Contractor to the Board's Business Administrator for decision and settlement. The enumeration in this contract, or in any of the documents made a part thereof, of particular instances in which the opinion, judgment, discretion or determination of the Board's Business Administrator shall control, or of work or material or other matters or things which shall be subject to his approval or inspection, shall not be deemed to limit the jurisdiction and authority of the Board's Business Administrator with respect to other matters and things of the Contractor required under the terms of this contract; but in all cases (except as otherwise stated in the body of this contract as distinguished from other documents made a part thereof), the Board's Business Administrator shall be the final judge of the performance of the Contractor's obligations and of the fitness and acceptability of all work and materials to be done or furnished and of the methods to be employed by the Contractor.

If any instruction, direction, interpretation or order given or made by the architect or other representative of the Board, or of the Board's Business Administrator in connection with the work of the Contractor conflicts with any instruction, direction, interpretation or order of the Board's Business Administrator, or any other representative of the Board, the conflict shall be forthwith reported to the Board's Business Administrator by the Contractor, and the decision of the Board's Business Administrator shall control.

4. The Contractor shall give the Board's Business Administrator and other representatives of the Board access at all times to the work of the Contractor and to the shops or other places where the work or materials therefor are in progress or preparation, and shall provide proper facilities for such access and for inspection of the work. All materials and work of the Contractor shall be subject to inspection and test by the Board's Business Administrator or his representatives; and before any materials or work of the Contractor or of other Contractors employed on the project are covered or enclosed by the Contractor, he shall give the Board's Business Administrator written notice that the same are ready to be covered or enclosed. The Board's Business Administrator shall have a reasonable time, after receipt of the Contractor's notice, to make such inspection or test or to cause the same to be made. If any work or materials are covered or enclosed by the Contractor before such notice and reasonable opportunity to act thereunder, the Contractor shall, upon request of the Board's Business Administrator or his representative, cause the same to be uncovered for inspection or test at the Contractor's expense. If the specifications, instructions of the Board's Business Administrator, the provisions of any law, ordinance, or rule or regulation of a public authority require any work to be specially tested or approved, the Contractor shall give the Board's Business Administrator notice of its readiness for inspection and test; and if the inspection and test are to be made by any agency or authority other than the Board's Business Administrator, notice of the time and place thereof. Re-examination of covered work or materials of the Contractor may be ordered by the Board's Business Administrator at any time, and if he determines that such work or materials do not conform to the requirements of this contract, the cost and expense of re-examination and replacement, including the cost of uncovering and recovering, shall be paid by the Contractor.

5. The Board's Business Administrator may reject any part of the work or materials of the Contractor which in the opinion of the Board's Business Administrator is unsatisfactory, defective, improper or inferior, or which fails in any respect to conform to the requirements of the plans and specifications and of this contract. In such case, the Contractor shall, at his own cost and expense, upon written request of the Board's Business Administrator and within the time therein specified, remove the rejected work and materials and replace the same with workmanship and materials approved by the Board's Business Administrator, and the Contractor shall bear the cost of making good all other work and materials, including the work and materials of other contractors, damaged or destroyed as a result of such removal or replacement. If the Contractor does not remove and replace the rejected work and materials within the required time, the Board may cause the same to be removed and replaced and the Contractor shall pay to the Board the cost of so doing and of incidental loss or damage occasioned thereby. Any rejected materials not incorporated into the project and removed by the Board under the provisions of this paragraph, may be stored by the Board at the Contractor's expense, and may be sold by the Board at any time at a public or private sale, the proceeds of such sale, less the costs of the sale, to be retained by the Board until completion of the project and included in the final settlement of the account between the Board and the Contractor. If the Board deems it expedient to allow such deficient work or materials to remain, the Contractor shall pay to the Board the difference in value, as fixed by the Board's Business Administrator, between the work and materials retained and the work and materials required hereunder, together with the cost, as fixed by the Board's Business Administrator, of incidental damage caused by the deficient work and materials; and the sums so to be paid by the Contractor may be deducted from any sums which may be payable by the Board to the Contractor. No certificate of any kind, whether partial or final, by whomsoever given, and no payment, whether partial or final, whensoever and by whomsoever made, shall be conclusive evidence of the satisfactory performance by the Contractor of his obligations under this contract, either wholly or in part, nor shall any such certificate or payment, or any approval or acceptance of any work or materials or of the completed project, or the Board's occupancy of the project in whole or in part, or the Board's use of any of the workmanship or materials be construed to be an acceptance of defective, improper, inferior or unsatisfactory work or materials, or of work or materials which do not conform to the requirements of this contract or of the requirements of any written orders, directions or instructions given or made by the Board's Business Administrator or his representatives. Notwithstanding any such certificate, payment, approval, acceptance, occupancy, or use, all rights and claims of the Board with respect to the obligations of the Contractor hereunder and with respect to such work and materials shall be deemed to be expressly reserved, and the Contractor shall remedy and make good all defective, improper, inferior, or unsatisfactory work and materials on demand, or the Board may cause the same to be corrected or replaced at the Contractor's expense.

6. The Contractor acknowledges and represents that he has fully informed himself as to all conditions at the site of the project, and relating to the plans and specifications and to the Contractor's obligations hereunder, that he has received all written bulletins, addenda, instructions, interpretations and modifications, whether or not hereto attached, issued by the Board's Business Administrator or his representatives prior to the execution of this contract; and that he has carefully examined and is familiar with the plans and specifications for his own work and for other branches of work, if any, to be done by other contractors in connection with the entire project. The Contractor shll carry out his work in accordance with the requirements of any additional detail drawings which may be hereafter furnished to the Contractor by or with the approval of the Board's Business Administrator for the purpose of clarifying, defining or coordinating the work to be done by the Contractor. If, in the opinion of the Contractor, any such detail drawings or any instructions, interpretations, decisions, directions, requirements or orders of the Board's Business Administrator or his representatives call for work or materials not embraced or contemplated by the plans or specifications and involving extra expense, he shall, within five days after the receipt thereof, give written notice of his objections and claims to the Board's Business Administrator in order that the drawings, instructions, interpretationsm decisions, directions, requirements and orders may be confirmed, withdrawn, amended, or corrected. The decisions of the Board's Business Administrator as to such objections or claims and as to the amount, if any, of extra compensation to be paid to the Contractor by reason of the matters specified in the Contractor's notice, shall be given to and shall be final and binding upon the Contractor, who shall proceed without delay to comply therewith. If such written notice is not given, the drawings, instructions, interpretations, decisions, directions, requirements, and orders shall be deemed to have been accepted and approved by the Contractor, who shall thereupon do all things required thereby without any claim or right to extra compensation.

The Contractor shall perform all work, furnish all materials and do all things necessarily required or implied in connection with his undertaking whether or not specifically indicated in the plans and specifications, in order to obtain a completed and unified condition. The plans and specifications and the several parts thereof are complementary, and all things shown on the plans and not mentioned in the specifications, or mentioned in the specifications and not shown on the plans, shall have the same effect as if shown or mentioned, respectively, in both. Any discrepancy, variance, conflict or inconsistency between the plans and specifications shall be adjusted, settled and decided by the Board's Business Administrator, whose decision with respect thereto shall be conclusive. The work of the Contractor shall be integrated and coordinated with and shall be so arranged in advance as not to delay, impede or cause extra expense in connection with the work of other Contractors, if any, engaged in the completion of the project and the Contractor shall in all respects cooperate with such other Contractors for the expeditious advancement of the project to satisfactory and proper completion. The Contractor shall keep himself informed of the progress and the detail work of other Contractors and shall immediately give to the Board's Business Administrator written notice of delays, lack of progress or defective workmanship on the part of other Contractors which interfere or may interfere with his own operations. Failure of the Contractor to keep informed of the work progressing at the site or failure immediately to give to the Board's Business Administrator written notice of delays, lack of progress or defective workmanship by others shall be deemed to constitute an acceptance of the work of other contractors and of conditions at the site as satisfactory for proper coordination with and the timely completion of his own work.

The within contract, and the plans, specifications, and instructions to bidders, pertaining thereto, and the provisions of any other contract with any other Contractor for any work to be furnished in connection with the project to which the within contract is applicable, including the plans, specifications and instructions to bidders, pertaining to such other contract, shall not be deemed to constitute and shall not constitute an undertaking by the Board to or an agreement by the Board with the within Contractor that the obligations of such other Contractor under such other contract will be fulfilled, and no such undertaking or agreement is made by the Board. The Board shall in no way be accountable or responsible to the Contractor for any delays caused by, or for any act or omission of other Contractors. The Board shall not be liable in any way or under any circumstances for any delay, loss or damage, or for compensation therefor, resulting from any act or omission of any such other Contractor under any such other contract, and the Contractor shall have no recourse against the Board for any such delay, loss or damage. No extra sums by way of compensation, or for damages, extras or penalties shall under any circumstances be payable by the Board to the Contractor for delays, whatever the cause thereof, and whether or not due to or resulting from any act or omission of the Board or of any other Contractor or of any employee of the Board.

The Board assumes no responsibility or liability whatever for any delays under any circumstances or for any failure of the architect, the Board's Business Administrator or any other Contractor to do any act or thing required by them to be done under the provisions of the within contract or of any other contract made by the Board for work to be done or materials to be furnished in connection with the project to which the within contract is applicable or under the provisions of the drawings, specifications, or instructions to bidders pertaining thereto.

7. The Contractor shall furnish all labor, materials, supplies, apparatus, scaffolding, tools, temporary structures and other facilities, and unless and except as otherwise expressly stated in the specifications all fuel, energy, light and other items of temporary utility necessary for the entire and proper completion of his work or incidental thereto; and shall promptly pay all charges and bills therefor when due. All freight, cartage, transportation and storage charges relating to, and all charges for handling and checking of his materials and equipment shall be paid by the Contractor when due. The Contractor shall do all things required to be done hereunder in a good and workmanlike manner. All materials to be supplied by the Contractor shall be new, and all his work shall be executed by skilled labor so selected and assigned as to insure continuous progress of the work without delay or interruptions. All materials must be of the best quality of their respective kinds and all workmanship must be first class in every respect. The Contractor shall, upon request of the Board's Business Administrator, furnish satisfactory evidence as to the kind and quality of materials used or to be used in the work of the Contractor; and shall furnish samples of such materials in such form as the Board's Business Administrator may require. All materials used in the work of the Contractor shall be fully equal to the approved samples.

The Contractor shall pay all royalties and license fees for the use of any patented article or process; shall defend all suits or claims for infringement of any patent rights, and shall save the Board harmless from loss or expense on account thereof; and shall give notices and, subject to the provisions of section 18;11-11 of the Revised Statutes of New Jersey, shall obtain and pay for all permits, licenses and inspections required by any law or ordinance or by the rules or regulations of any public body, agency or authority.

8. To the extent required by section 40:15-1 and 52:33-1, 2, 3, of the Revised Statutes of New Jersey, the Contractor shall use only domestic materials and products as in these sections defined in the performance of his work. If the Contractor shall fail to comply with the provisions of section 34:9-2 of the Revised Statutes (requiring that preference in employment to be given to New Jersey residents) this contract shall be voidable at the instance of the Board. Mechanics, workers and laborers, while engaged in the work of the Contractor, shall work no more than eight hours in any one day, except under circumstances permitted by the provisions of section 34:10-1 of the Revised Statutes of New Jersey, and the Contractor shall comply with the provisions of the said section relating to the payment of the prevailing rate of daily wages to mechanics, workers and laborers. The Contractor agrees that he and all persons acting in his behalf will comply with, and the work to be done hereunder shall be subject to, all of the provisions of section 10:2-1 of the Revised Statutes of New Jersey (which prohibit discrimination in the hiring of workers, laborers and mechanics for public works, prohibit discrimination or intimidation of employees hired for the performance of public works, and prescribe the penalties and forfeitures applicable in case of such discrimination or intimidation) and the agreements listed in R.S. 10:2-1 shall be deemed to be part of this contract and shall be applicable to the work of the Contractor as though they were included herein. The Contractor shall comply with, and shall at his own cost do all things required by the provisions of all federal and state workmen's compensation laws, labor laws, fair employment practice and anti-discrimination laws, safety laws, and all other federal and state statutes and laws, municipal ordinances and the rules and regulations of public bodies, agencies or authorities, applicable to the obligations of and the work to be done by the Contractor hereunder.

9. If the specifications contain provisions for "alternates" in the work to be done and the materials to be furnished by the Contractor, the alternate or alternates specified above (Paragraph 1) shall control in connection with the said work and materials. If the alternates selected are not indicated above, the controlling alternates shall be those heretofore selected by the Board and specified in the notice of award of contract sent to the Contractor. The contract price hereinafter set forth includes compensation for the alternates applicable to the work to be done and the materials to be furnished by the Contractor. The Board may,

during the progress of the work under this contract, require that the controlling alternates, or any of them, be eliminated, or that other alternates, described in the specifications but not included in the within contract, shall apply to the work to be done or the materials to be furnished by the Contractor; in which event the contract price hereinafter set forth shall be increased or decreased as the case may be, on the basis of the respective bids made in terms of the respective alternates in the original proposal of the Contractor. If at the time elimination or inclusion of alternates is ordered, the work of the Contractor has progressed to such an extent that changes in the completed work, involving additional costs, are necessary because of such elimination or inclusion, such additional costs, determined in the same manner as hereinafter specified in the case of "extras" shall be added to the amount to be paid to the Contractor.

10. (a) The Board shall have the right at any time before completion and acceptance of the project, without invalidating this contract, to require the Contractor to make and the Contractor shall make such changes in the amount, kind, quality and methods and place of installation of the work to be done or the materials to be furnished by the Contractor, and such other changes in the work of the Contractor as the Board may deem desirable. Such changes may include extra work, materials, alterations, additions, deductions and modifications with respect to the work and the materials required under the original plans and specifications, or under any changes at any time ordered by the Board. The Board may order or require such changes whether or not the notice mentioned in sub-paragraph (b) of this paragraph has been given. Written orders for such changes, bearing the signature of the Board's Business Administrator shall be given to the Contractor, and when so given, but not otherwise, the changes shall be made by the Contractor. All such changes inclusive of "extras" required in connection therewith shall be made and furnished by the Contractor in full compliance with and shall be governed by all provisions of this contract relating to the work and materials originally specified. The Contractor shall do all things necessary to accomplish such changes, including the alteration or removal of any completed or partly completed work or installations required to be altered or removed because thereof.

(b) The Board's Business Administrator may at any time before completion and acceptance of the project give notice to the Contractor of any such changes which may be proposed or contemplated, and the Contractor shall, within five days after the giving of such notice, give to the Board's Business Administrator, in duplicate, a written statement in such form and detail as the Board's Business Administrator may require, setting forth the following information: the sum, if any, inclusive of all charges for extras, which the Contractor claims should be added to or deducted from the original contract price, by reason of such changes, and the basis of computing the said sum, with the several items of cost separately stated as to labor, material, overhead and profit; and the number of days, exclusive of Sundays and legal holidays, by which the Contractor claims the time herein required for completion of the original work should be extended or reduced by reason of the changes, and an explanation as to how the claimed increase or decrease in the completion time is arrived at by the Contractor. If the statement is not given within the above mentioned time, the increase or decrease, if any, in the original contract price and completion time, for any changes mentioned in the notice of the Board's Business Administrator and ordered by the Board shall, subject to the provisions of sub-paragraph (c) of this paragraph (paragraph 10) be fixed and determined by the Board's Business Administrator, and his decision shall be final and binding.

(c) An increase or decrease, if any, in the original contract price and completion time, for changes mentioned in this paragraph (paragraph 10) and ordered by the Board shall be agreed upon in writing between the Board and the Contractor, and no oral agreement or understanding as to the amount thereof shall be binding in any respect or either party hereto. If the Board and Contractor fail to arrive at such agreement in writing within 10 days following the date when the written order for a change has been given, and an increase or decrease is claimed, the party asserting such claim shall, within 15 days following the end of the said 10 day period, give to the other party notice of the claim and of the nature and extent thereof and of the details and computations on which it is based. If such notice is not given within the said 15 day period, no increase or decrease, as the case may be, in the original contract price and completion time shall be allowed. If such notice is given and the amount of increase or decrease therein stated is disputed by the party receiving the notice, the amount of such increase or decrease shall be fixed and determined by the Board's Business Administrator, and the amount so fixed and determined shall be final and binding on the parties. In the case of a notice of a claim for an increase, given by the Contractor, the several items covered by the claim shall be separately stated therein as to labor, material, overhead, and profit, and in connection therewith the Contractor shall furnish such additional information as the Board's Business Administrator may require.

(d) From time to time during the progress of the work, orders for changes in the work or materials may be given by the Board's Business Administrator to the Contractor. Such orders shall be given in writing and not otherwise, and the Contractor shall comply with them without delay. If in the judgment of the Board's Business Administrator these orders involve extra work or materials, compensation therefor shall be determined and paid for as provided elsewhere in the contract or specifications.

(e) In the event of any changes in the work to be done or of the materials to be furnished by the Contractor, in accordance with the provisison of this contract, no allowance for delays in the work of the Contractor caused by such changes shall be included in computing the amount, if any, to be paid by the Board to the Contractor by reason of the changes.

11. The Contractor shall not endanger his own work or that of others, and shall at all times provide and maintain all guards, passageways, sheds, fences, lights, warning signs, and other facilities and shall do all things required or necessary to protect his property from damage by the elements or from any other cause, or required or necessary to prevent damage to other property, or injury to persons or to secure the safety and convenience of other Contractors and the public in connection with the work to be done by the Contractor. He shall be responsible for all damage to the work, materials and other property of all persons, including other Contractors and the Board, and for injury to persons that may be caused in any manner in the performance of his work, or by or as a result of the conduct or neglect of the Contractor, his agents, employees and subcontractors; and shall indemnify and save harmless the Board from all claims, demands, expenses, liability, or loss by reason of any such damage or injury. The Board may repair or correct, or cause to be repaired or corrected, any property damage done by the Contractor or resulting from any conduct or neglect by him or his agents, employees, or subcontractors at the cost and expense of the Contractor hereunder, who shall pay such cost to the Board on demand. If any work done or materials installed by the Contractor is destroyed, damaged or depleted by fire, lightning, windstorm, tornado, hail, explosion, riot, strike, civil commotion, aircraft, vehicles, smoke, water, vandalism, malicious mischief, theft, or any other cause or circumstance whatever, before the acceptance by the Board of the entire project to which the within contract applies, the Contractor shall forthwith replace the said work and materials without loss or expense to the Board, to the same extent and in the same manner as required by this contract with respect to the original work and materials, and all of the agreements made in the within contract by the Contractor with respect to the original work and materials shall apply to work done and materials installed in replacement thereof.

12. The Contractor shall take out, before he commences work hereunder, and shall maintain thereafter until the final completion and acceptance of his job and shall pay for workmen's compensation insurance for all of his employees employed in connection with the Contractor's work under this contract; and in case any of his work is sublet, the Contractor shall require the subcontractor likewise to take out, maintain and pay for such insurance for the employees of the subcontractor.

The Contractor shall take out, before he commences work hereunder, and shall maintain thereafter until final completion and acceptance of his job and shall pay for public liability and property damage insurance, written by an insurance company or companies approved by the Board's Business Administrator and licensed to do business in New Jersey, indemnifying the Board and the Contractor against and protecting the Board and the Contractor from claims for damages for personal injury, including accidental death and indemnifying the Board and the Contractor against and protecting the Board and the Contractor from claims for property damage, which may arise from the operations of the Contractor or any subcontractor under this contract. The policies for public liability and property damage insurance shall include contingent liability and contingent property damage insurance to protect the Board against claims arising from the operations of the Contractor and his sub-contractors; shall name and cover the Board as an assured; shall contain riders to include, as part of the policy, protection against such special hazards as the Board's Business Administrator may specify; shall be delivered to the Board's Business Administrator before work under this contract is commenced; shall be the property of the Board until the final completion and acceptance of the work of the Contractor; shall protect the Board in an amount of not less than $100,000, for claims for injury to or death of any one person in connection with any one accident, and in an amount not less than $300,000, for claims for injury to or death of more than one person in connection with any one accident; and shall protect the Board in an amount not less than $25,000 for claims for property damage in connection with any one accident and in an aggregate amount of not less than $50,000 for claims for property damage in connection with all accidents. It shall be the obligation of the Contractor to require and arrange that similar public liability and property damage insurance be carried by each of his sub-contractors for the Board's protection and delivered to the Board. Evidence of payment of premiums for the above required policies of insurance shall be furnished to the Board's Business Administrator upon demand. The Board shall have no responsibility for any neglect or failure of the Contractor to take out, maintain, or pay for any such insurance.

13. The Contractor shall not allow any rubbish, refuse, scrap materials or debris caused by his operation or those of his sub-contractors to accumulate, and shall remove the same from the site and adjacent streets and ways at least weekly and whenever so directed by the Board's Business Administrator or his representatives to the end that the site and vicinity of the work shall present a neat, orderly and workmanlike appearance. At the completion of his work, the Contractor shall leave the premises and adjacent ways and streets in a clean and, neat condition and shall remove therefrom all his surplus materials, apparatus, equipment, tools, scaffolding and temporary structures, and all rubbish, refuse, scrap materials and debris caused by his operations. He shall store his apparatus, materials, supplies, equipment, tools and other property at the site in such an orderly fashion as will not interfere with the progress of his work or the work of others; shall not unduly encumber the premises therewith and shall comply with the directions of the Board's Business Administrator with respect to the storage thereof. He shall effect all cutting, fitting or patching of his work required to make the same conform to the plans and specifications, and, except with the consent of the Board's Business Administrator, shall not cut or otherwise alter the work of any other contractor. He shall not load any structure with a weight that will endanger its safety. He shall not, without the consent of the Board's Business Administrator, place any advertising matter at the site or any part of the works, or on any temporary structures, and shall remove such advertisement when required by the Board's Business Administrator.

14. The Contractor shall be responsible for the proper execution of the entire work to be done under this contract. He shall not enter into any subcontracts for any part of the work without the written permission of the Board's Business Administrator. No.sub-contractor whose engagement is not approved in writing by the Board's Business Administrator shall be permitted to do any part of the work, and the Board or the Board's Business Administrator may reject any work done by sub-contractors not so approved. Approval of any sub-contractor by the Board's Business Administrator shall in no way relieve the Contractor from full responsibility for the work and may be withdrawn at any time if, in the opinion of the Board's Business Administrator, the work of the sub-contractor is unsatisfactory, and such approval shall not be deemed to establish any relationship of any kind between the Board and the sub-contractor. The work and materials of all sub-contractors shall be subject to the same rights on the part of the Board as if the work were done or the materials furnished by the Contractor, and all of the provisions of this contract shall be binding upon said sub-contractors with respect to their work and materials to the same extent as would be the case if the work or materials were done or furnished by the Contractor instead of said subcontractor. The Contractor shall not assign this contract or any interest therein or any monies due or to become due hereunder. The Board may at any time withdraw any consent to such assignment previously given. If any such assignment is made without the Board's consent, the Board shall have no obligation to the assignee, except such as the Board at its option may assume, whether relating to the completion of the work, the payment of any monies due or to become due hereunder, or to any other matter or thing.

15. The Contractor shall give efficient supervision to the work. He shall at one report to the Board's Business Administrator any error, inconsistency, or omission which he may discover in the plans, specifications, instructions, or bulletins relating thereto. He shall employ and keep in charge of his work at the site, whenever his work is in progress, a competent and responsible superintendent to represent him and authorized to receive and execute the instructions and directions of the Board's Business Administrator and his representatives, and instructions, direction, order, notice, decision, demand or request given to such superintendent by the Board or its agents, or by the Board's Business Administrator or his representatives, shall be deemed to have been given to the Contractor. The name and address of such superintendent shall be given in writing to the Board's Business Administrator by the Contractor as soon as work commences hereunder, and the superintendent so named shall be deemed to be the representative and agent of the Contractor unless and until written notice of the appointment and of the name and address of his successor is given to the Board's Business Administrator by the Contractor. The Contractor shall, upon written demand of the Board's Business Administrator, discontinue the services of any person employed in the performance of this contract whose work or services are, in the opinion of the Board's Business Administrator, unsatisfactory or who is unfit or incompetent. The Board's Business Administrator, shall have the right at any time, upon notice in writing, to require the Contractor at his expense to employ and keep such extra labor and additional material as, in the opinion of the Board's Business Administrator, shall be necessary to insure completion of the work within the time required by this contract, and if the Contractor shall fail to comply with such notice within three days, not including Sundays or legal holidays, from the time of the giving thereof, the Board's Business Administrator or the Board may employ such extra labor and supply such additional material, at the expense of the Contractor, as they or either of them may deem necessary, and the Board may deduct the cost thereof from any monies due or thereafter becoming due to the Contractor. The Board's Business Administrator or his representatives may at any time, direct the Contractor in writing, to suspend operations on any specified part of the work or any location, and to advance, and to transfer the Contractor's workmen to any other part of the work, if in the opinion of the Board's Business Administrator it is necessary or expedient so to do in order to insure the expeditious and efficient performance of the obligations of the Contractor hereunder. The Board's Business Administrator may stop work hereunder whenever in his opinion such stoppage is necessary to insure proper performance of this contract.

16. The Contractor shall give to the Board's Business Administrator such reports, statements of completed work, time estimates, progress schedules, information as to bills or charges for labor or material, or other costs incurred by the Contractor in connection with his work, and evidence of the payment of such bills or charges, and such other records and information relating to the Contractor's obligations and to the work to be done or material to be furnished hereunder, as the Board's Business Administrator or his representatives shall request, within the time specified in the demand therefor and in such form and detail as the Board's Business Administrator may require. The Board shall have the right, at the cost and expense of the Contractor, to settle or adjust any of the demands upon, or liens, claims or suits against the Board, and to make payments in connection therewith or on account thereof, arising out of or relating to the work to be done or the materials to be furnished by the Contractor, or arising out of or relating to the obligations of the Contractor under this contract. The Board may deduct and retain out of any payment due or to become due to the Contractor the amount of any such settlement, adjustment or payment and all expenses of the Board in connection therewith, and such other amounts as in its opinion shall be sufficient to fully indemnify itself against such liens, claims, demands or suits. The Board may at its option and at the Contractor's cost and expense, at any time before final completion and acceptance of this project, do or cause to be done any or all things by the Contractor to be done hereunder, and which the Contractor fails to do as and when required by the provisions hereof, and to make any payment by the Contractor to be made hereunder and which he fails to make as and when required by the provisions hereof, and the cost and expense of all things so done and the amount of all payments, so made by the Board may be deducted and retained by the Board out of any payment due or to become due to the Contractor under this contract.

17. If the Contractor fails at any time to supply a sufficiency of skilled workmen, or of materials of the proper quality, or fails in any respect to prosecute the work properly and with promptness and diligence, or to perform any of his agreements under this contract or to do any act or thing by him required to be done under the provisions hereof, or to remove, correct and cure any violation of any of the provisions of this contract relating to his obligations hereunder, and if such failure shall continue or shall not be fully remedied and eliminated by the Contractor within 3 days after written notice thereof has been given to the Contractor by the Board's Business Administrator (except as to any matters for which a specific period of time is provided or allowed elsewhere in this agreement, and in such cases within such specified period of time); or if the Contractor shall adjudged a bankrupt or make an assignment for the benefit of creditors; or if a receiver or liquidator should be appointed for the Contractor of any of his property and is not dismissed or discharged within 20 days after such appointment; or if the Contractor fails to make prompt payment for labor or work done or supplied, or for any materials, apparatus, equipment, or supplies furnished or used, or for any other obligations of the Contractor incurred in the performance of this contract; or if the Contractor should abandon the work, then and in any such event, the Board, without prejudice to any other rights or remedies it may have, may at its option, without further notice, discontinue and terminate the employment of the Contractor, either as to the entire work or any part thereof, and may take over the work of the Contractor and by contract or otherwise finish and complete the same and provide the materials therefor, or cause the same to be finished, completed and provided by others, and do or cause to be done any and all other things by the Contractor remaining to be done under the provisions of the contract. In the case of such discontinuance and termination of the employment of the Contractor, the Board may take possession of any or all materials, tools, supplies, equipment, apparatus and other property of the Contractor at the site of the work and use the same in the completion of the work remaining to be done; and the Contractor shall not be entitled to receive any further payment from the Board until the entire project, including the work to be done under this contract, has been wholly finished and accepted. If the unpaid balance of the amount payable under this contract, less all sums deductible therefrom by the provisions thereof, shall exceed the expense, costs and charges incurred by the Board in finishing and completing the work (including compensation for additional managerial, administrative and inspection services, and damages for delay) such excess shall be paid to the Contractor; but if such expense, costs and charges exceed such unpaid balance, the Contractor shall be liable for and shall pay the difference to the Board. The expense, costs and charges incurred by the Board under the provisions of this paragraph shall be audited and certified by the Board's Business Administrator, and his certificate as to the amount thereof shall be conclusive and binding upon the Contractor.

18. The Contractor guarantees all work to be done and materials to be furnished hereunder, inclusive of extra or additional work and materials, against defects and against damage from proper and ordinary wear and use for one year after final payment therefor and agrees to make good all such defects and damages upon demand. This guarantee is in addition to others which may be required by the provisions of the specifications, and shall not limit or in any manner affect such specific guarantees and the obligations of the Contractor with respect thereto. Final payment and acceptance of the work shall not affect the above one-year guarantee or any such specific guarantees, or the right of the Board to receive and have, or the obligation of the Contractor to deliver any written and signed specific guarantees required by the specifications and not delivered to the Board at the time of such final payment and acceptance.

19. The performance bond required by the provisions of the instructions to bidders shall be delivered by the Contractor as in the said instructions required, at the time of the execution and delivery of this agreement. If at any time the Board shall be or become dissatisfied with any surety or sureties then upon the performance bond, or with the sufficiency of such surety or sureties, the Contractor shall within 5 days after notice from the Board or the Board's Business Administrator so to do, deliver to the Board's Business Administrator another bond in the same form and amount as originally required, signed by the Contractor and by such other sureties as are satisfactory to and approved by the Board, and shall pay the premium therefor. The Board shall not be obligated to make any payments under this contract until such bond with new approved sureties has been delivered as herein required.

20. The Contractor shall commence his work at the site of the project as follows:

COMMENCEMENT DATE: June 10, 1962

and shall thereafter without delay or interruption advance the same with a proper and sufficient force of workmen and an ample supply of material. The Contractor shall fully complete the several portions and the whole of the work and install all of the materials of him required by this contract and in full compliance with all of the provisions thereof as follows:

COMPLETION TIME: June 1, 1964

The aforesaid completion time is hereby made and declared to be of the essence of this contract. If the said completion time is extended as hereinabove or hereinafter provided, the extended time shall be of the essence of this contract. The Contractor, understanding from the nature of the subject matter of this contract that the Board will suffer loss and damages in the event of his failure to complete the work of him required under this contract within the time above stated, or within the time to which the completion date may be extended as hereinabove or hereinafter provided, and that determination of the amount of such loss to and damages of the Board for such failure would be difficult by reference to any usual pecuniary standard, hereby agrees to pay to the Board and that the Board may deduct from any monies due or payable or to become due or payable to him under the provisions of this contract, as and for liquidated damages for such failure, the sum of Two Hundred and 00/100 dollars ($200.00) for each and every day between the above stated completion time, or the time to which the same may be extended as hereinabove or hereinafter provided, and the actual time of completion of the work by him to be done whether such work be completed by the Contractor or by the Board because of the Contractor's defaults, the said sum being hereby fixed and settled as the liquidated and ascertained damages which will be suffered by the Board by reason of such failure. The above provisions for liquidated damages for the Contractor's delay in completing his work, or the deduction of such liquidated damages from any monies due or payable, or to become due or payable to the Contractor shall in no way affect, or relieve or release the Contractor from his further or other obligations hereunder, or from the fulfillment of his entire contract, or from his liability for damages for any failure on his part with respect to such further or other obligations or his failure to fulfill his entire contract. The above provisions as to liquidated damages for delays shall apply to delays caused by the Contractor to other Contractors in the completion of the work of such other Contractors within the time specified for such completion under their respective agreements with the Board. If the Contractor should be delayed in the completion of his work within the time above stated by reason of any wrongful act or neglect of the Board or any other contractor employed by the Board; or by fire or similar casualty for which the Contractor is not responsible; or by epidemics or quarantine restrictions; or by riots, civil commotions, strikes or freight embargoes,--then, in any such event, the aforesaid completion time shall be extended for a period equivalent to the time lost by reason of any or all of the said causes, as fixed and determined by the Board, but no such extension shall be allowed unless notice of the cause of delay and of claim therefor is given in writing by the Contractor to the Board's Business Administrator within 48 hours of the commencement thereof. The Contractor shall not be entitled to any extension of time for delays in the delivery of materials by reason of shortages at the source of supply, it being the obligation of the Contractor to make the necessary arrangements and to obtain the necessary commitments for the delivery of materials in time to insure the advancement of his work and the completion thereof in accordance with his obligations under the within contract. The Contractor shall use all honorable and reasonable means to avoid and prevent strikes, violations of labor agreements, and labor disputes in connection with his work. Should strikes or labor disputes occur, he shall use all reasonable and proper means to effect settlement thereof and the resumption of work interrupted or delayed thereby. No extension in completion time by reason of any strike or labor dispute shall be required hereunder if in the opinion of the Board, the same has been caused by the Contractor's violation of a labor agreement or with his collusion.

Rev. 3/1/61
Typed 5/4/62

Payment on Certificate

The completion time may be extended by agreement between the parties to this contract, without affecting in any way the other and further obligations of the Contractor. No extension in the completion time or the acceptance by the Board of the whole or any part of the work to be done under this contract, or the Board's occupancy of the premises in whole or in part on or previous to completion, or any payment made by the Board, shall constitute a waiver of any rights of the Board hereunder, including its right to damages for any delays not expressly excused in writing.

21. The Board agrees to pay to the Contractor for the work and materials required to be furnished and installed by the Contractor and for the full and complete performance by the Contractor of all his obligations hereunder, subject to additions or reductions as hereinabove provided, the sum of

($ 3,996,000.00 Three Million, Nine Hundred Ninety-Six Thousand and 00/100 Dollars.

The time of payment of the aforesaid sum shall be as follows:

Not later than the 10th day of each month during the progress of the work the Contractor will give to the Board's Business Administrator, in such form and detail and with such supporting documents as the Board's Business Administrator may require, an itemized written statement of (a) the total amount of work done and material installed prior to the 1st day of the same month, and of (b) the amount of work and materials installed from the end of the period covered by the last previous similar statement to the 1st day of the month in which the current statement is given. Each statement shall show the separate percentage of the total amount of work and materials required by this contract, represented by the work done and materials installed since the commencement of work, and since the period covered by the last previous statement; and shall set forth the payment requested at the time the statement is given. The Board's Business Administrator, upon receipt of such statement, shall estimate the value of the work completed and materials installed, computed with relation to the total sum which the Contractor is entitled to receive for all of the work to be done and materials to be furnished under this contract. The value so estimated shall be reduced to the amount approved by the Chairman of the Board's Committee on Buildings, Grounds, and Supplies, if in the opinion of the said Chairman it should be reduced. A certificate for the payment of 85% of the value so estimated, less the aggregate amount of payments for which such certificates have been previously delivered to the Secretary of the Board, will be signed by the aforesaid Chairman and the Board's Business Administrator and delivered to the Secretary. The final certificate shall be for the entire balance remaining to be paid to the Contractor upon satisfactory completion of the whole work to be done by the Contractor hereunder. Final payment of the balance payable to the Contractor shall be made upon the satisfactory completion of the whole work to be done by the Contractor and the acceptance thereof by the Board.

No payment shall be made to the Contractor unless and until a certificate therefor, signed by the Board's Business Administrator and the Chairman of the Board's Committee on Buildings, Grounds, and Supplies, has been delivered to the Secretary of the Board, and the issuance and delivery of the certificate shall be a condition precedent to any liability of the Board for any payment to the Contractor. Such certificate may be withheld, and any certificate given may be withdrawn or nullified, for any cause deemed proper by the Board's Business Administrator or the said Chairman. Each payment shall be subject to the Board's approval, and when so approved will be made within the time normally required by the established procedures of the Board and in the Office of the Custodian of School funds for the processing and payment of bills. Delay by the Board in making any payment to the Contractor shall not justify or excuse suspension or abandonment of or delay in the work of the Contractor, or affect the Contractor's liability for such suspension, abandonment or delay, or affect or relieve or release the Contractor from any of his obligations hereunder; nor shall the Board be liable for any interest or damages whatsoever by reason of any delay in making any payment. The Board may make any payment in advance of the time when the same may be due or payable, and may waive any provision of this contract relating to the making thereof, including any provision relating to certificates for payment, without limiting or in any manner affecting any of the Board's rights under this agreement.

By his acceptance of the final payment, the contractor acknowledges that he has paid in full all outstanding claims for wages, materials, or other debts and that he has no further claims against the Board for any cause whatsoever.

Rev. 3/1/61
Typed 3/20/62

Payment on Certificate

22. This contract shall bind all persons, firms and corporations included or embraced by the term "contractor" as herein used, jointly and severally. As used herein, the singular shall include the plural, the masculine shall include the feminine and neuter; "materials" shall include supplies, equipment, and appliances; and "work" shall include material, labor, supplies, equipment, and appliances. Any notice, demand, decision, instruction, requirement, interpretation, or other document to be given to the Contractor by the Board or its representatives or by the Board's Business Administrator or his representatives pursuant to any provision of this contract, shall be deemed to have been properly given and shall bind the Contractor upon service thereof on him or on any superintendent, foreman, or other principal employee of the Contractor engaged in the performance of this contract, or upon the mailing thereof by registered or certified mail, return receipt requested, addressed to the Contractor, either at the address of the Contractor given in the proposal on which this contract is based, or at the Contractor's last business address known to the Board's Business Administrator. Service on or mailing to any person, firm or corporation included in or embraced by the term "Contractor" as herein used, shall have the same effect as in the case of service on or mailing to the Contractor and to each and all of those embraced by the said term. Service on any partner shall be deemed to be service on the partnership, and service on any officer, agent or representative of a corporation shall be deemed to be service on the partnership, and service on any officer, agent or representative of a corporation shall be deemed to be service on the corporation. Any notice, demand, decision, instruction, requirement, interpretation, statement, report, or other document to be given by the Contractor to the Board or the Board's Business Administrator may be served on the Board's Business Administrator, or any other person in charge of his office; or may be given by registered or certified mail, return receipt requested, addressed to the Board at 31 Green Street, Newark 2, New Jersey, and marked for the attention of the Board's Business Administrator. The day on which any of the above mentioned documents is served or mailed shall be counted as one of the days of the time allowed for the giving thereof, or within which compliance is required. This agreement shall bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF each corporate party hereto has caused this contract to be signed by its duly authorized officers and agents and its corporate seal to be hereto affixed, and each unincorporated party hereto has signed and sealed this contract, on the date first above written.

Signed, Sealed and Delivered
in the presence of

THE BOARD OF EDUCATION OF NEWARK
IN THE COUNTY OF ESSEX

Signed
By Arnold Hess
Secretary, Board of Education

Signed
By Morris Fuchs
President, Board of Education

(seal)

ARTHUR VENNERI COMPANY
Name of Corporation

Attest:
Signed
E.M. Iarussi
Secretary

Signed
By: Benedict Torcivia
President

Contractor's Seal

THE BOARD OF EDUCATION OF NEWARK

IN THE COUNTY OF ESSEX

Sealed proposals will be received in the Board Room, fourth floor, Board of Education Administration Building, 31 Green Street, Newark 2, New Jersey, on Friday, May 25, 1962, between 2:00 and 2:05 P. M. Daylight Saving Time, and then publicly opened and read for:

BARRINGER HIGH SCHOOL

Contract #1 - General Construction Work

Contract #2 - Structural Steel, Miscellaneous Metal Work

Contract #3 - Plumbing & Gas Fitting Work

Contract #4 - Heating & Ventilating Work

Contract #5 - Electrical Work

Contract #6 - Kitchen Equipment Work

Contract #7 - Elevator Work

Sealed proposals must be submitted for each category of work separately listed above.

The following documents applicable to the proposals are obtainable at the Office of the Department of Business Administration, on the fourth floor of the Administration Building at the above address: instructions to bidders; proposal form; contract form; form of performance bond; plans and specifications; questionnaire; and form of envelope for transmission of proposals. A deposit of $75.00 will be required for each set of plans and specifications. Checks shall be made payable to the Newark Board of Education.

Plans and specifications will be available on and after April 27, 1962.

All proposals must be submitted on the prescribed forms. Information as to security required with each proposal is contained in the above documents.

The Board reserves the right to reject any or all proposals, and to waive any informality in any proposal.

By order of

The Board of Education of Newark
in the County of Essex

May 1, 1962.

Rev. 3/26/62
Typed 3/26/62

BOARD OF EDUCATION

DEPARTMENT OF BUSINESS ADMINISTRATION

Newark 2, N.J.

Date May 25, 1962

Project Barringer High School

To Bidders:

The following documents are submitted herewith:

1. Newspaper advertisement
2. Instructions to Bidders
3. Proposal Form
4. Contract Form
5. Performance Bond Form
6. Plans and Specifications
7. Questionnaire
8. Special Envelope for Proposals

Use the special envelope to submit your proposal.

Bidders are urged to read with care all of the above documents and to follow all of the Instructions to Bidders and the instructions on the Proposal Form, especially those which deal with the filling out of blank spaces in the Proposal Form and with the signing of the proposal. Do not forget to follow requirements as to bid security.

Bids must be delivered at the time, on the date, and at the place stated in the advertisement, and on no other date and at no other time and place. For this reason it is not safe to mail your proposal. Personal delivery by the bidder, or the bidder's representative or messenger, is recommended.

Superintendent of Schools

Typed 1/7/63

INSTRUCTIONS TO BIDDERS

CHANGE IN TITLE OF BOARD REPRESENTATIVE

Wherever in the "Instructions to Bidders", "Contract", "Plans", "Specifications" or elsewhere in the contract documents, the term "Architect", "Business Superintendent", "Assistant Superintendent of Schools in charge of Business Administration" appears, they shall each be considered as referring to the Board's Business Administrator. If the position of Business Administrator is vacant, then these terms shall be interpreted to mean such other person as may be designated by the Board for the purpose of this agreement as its business representative. In the absence of any designation, the Superintendent of Schools shall be considered as the business representative.

BASIS OF CONTRACT AWARD

The Board will award the respective Contracts, based upon the bids of each Contractor submitted in accordance with the requisite "FORM OF BID". The amount of the bid is deemed to be the base bid less any deductive items and plus any additive items to be made to the bid with respect to such alternates as are included in the award. The successful bid will be that base bid, adjusted to include deductions and additions for alternates included in the award which is the lowest of those received.

PREQUALIFICATIONS OF BIDDERS ON SCHOOL CONSTRUCTION

Chapter 105 - Laws of 1962

The attention of all bidders is directed to the following:

1. A Bidder on Public Work for a Board of Education on and after January 1, 1963, must first have been qualified by the State Board of Education.

2. The Bidder must submit with his bid a Notarized Affidavit setting forth the type of work and the amount of work for which he has been qualified, that there has been no material adverse change in his qualification information, the total amount of uncompleted work on contracts at the time and the date of the classification. (Forms for this purpose are available from the Director of School Building Services, Department of Education, Trenton 25, N.J.)

While the above covers the principal requirements of Chapter 105 insofar as Boards of Education are concerned, it is recommended that the entire act be read carefully

Inquiries with respect to contractor prequalification or classification should be addressed to Russell I. Grimm, Supervisor of Contractor Classification, Bureau of School Building Services, Department of Education, Trenton 25, New Jersey."

Re-typed - November, 1962

INSTRUCTIONS TO BIDDERS

1. Receipt and Opening of Bids. Sealed proposals will be received by the Board of Education of Newark in the County of Essex for

at the time and place stated in the newspaper advertisement placed by the Board therefor and then publicly opened and the contents thereof announced. Bidders and their representatives are invited to be present when the proposals are received and opened.

Proposals delivered before or after the time stated in the advertisement will not be considered.

2. Applicability of Within Instructions. All of the within instructions shall be deemed to be part of each proposal and of any contract made pursuant thereto. If a provision of the Instructions conflicts with a provision of the specifications, the provision in the Instructions shall govern; and if a provision of the contract conflicts with a provision of the Instructions or of the specifications, the provision in the contract shall govern.

3. Definitions. The following terms wherever used in any of the contract documents, shall have the meaning in each case indicated below:-

Architect:

Robert H. Fava, 30 James St., Newark, N. J.

unless and until the Board designates another person to act with or in place of the person named above, and thereafter those so designated.

Bidder: Each person who submits a proposal in response to the above mentioned advertisement. If two or more persons join in a proposal,it shall bind all of them jointly and severally.

Board: The Board of Education of Newark in the County of Essex, a New Jersey corporation. The terms "owner" and "Board" shall have the same meaning. The Board's address is 31 Green Street, Newark 2, N.J. The office of the Board's Business Administrator is on the fourth floor of the building at that address.

Contract Documents: The instructions to bidders, proposal form, contract form, form of performance bond, and the plans and specifications applicable to the project. These are available to prospective bidders, who must leave a receipt therefor, at the office of the Board's Business Administrator. If plans applicable to a project have not been prepared, the term "plans" as used in any of the contract documents shall not apply. The terms "proposal" and "bid" shall have the same meaning.

Project: The entire undertaking in connection with which the work of the bidder is to be done. A project may embrace more than one location, as in the case of alterations or repairs at two or more school buildings. Projects and separate units thereof may be identified by their popular designation as ("Clinton Place School", "18th Avenue Playground", "Rippel Field"), etc.

Specifications: The usual meaning of the term of the building trades. The term includes the general conditions which may accompany the technical specifications; and such provisions of a contractual nature as may appear in or in conjunction with the technical specifications or the "general conditions."

Work: Includes all labor, materials, equipment, apparatus, fuel, power, light, scaffolding, tools, temporary structures and other facilities necessary for the entire and proper completion of the job for which a proposal or contract is made, except to the extent otherwise expressly stated in the specifications separately prepared for the job.

The singular shall include the plural, and the term "person" and the masculine pronoun shall apply to individuals, partnerships and corporations,--as the sense requires.

4. Rights Reserved. The Board reserves the right to reject any or all proposals, and to waive any informality in any proposal.

5. Preparation of Proposal. Proposals must be submitted only on the prescribed proposal forms. Bidders must follow the directions appearing on the proposal form, and must complete in ink or by typewriter all the blank spaces in the form. The affidavit on the back of the form must be supplied. It is the bidder's responsibility properly and fully to complete and execute the proposal. Separate proposals on separate forms must be submitted for each category of work separately listed in the advertisement.

6. Transmission of Proposal and Bid Security. Each proposal, together with required certified check or bid bond (see section 15,"Bid Security", below) must be delivered at the time and place specified in the advertisement, in a sealed envelope, addressed to "Newark Board of Education, 31 Green Street, Newark 2, N.J." The outside of the envelope must show the name and address of the bidder and the project and category of work for which the proposal is made. Approved form of envelope may be obtained at the office of the Board's Business Administrator. The timely submission of the proposal and bid security is the responsibility of the bidder.

7. Plans and Specification Deposit. Each bidder must familiarize himself with the a vailable plans and specifications for the entire project and will be bound by the contents and provisions thereof which affect the work covered by his proposal. The plans and specifications are the property of the Board and must be returned to the Board's Business Administrator, in good condition, by each prospective bidder who receives them, not later than the day fixed for the opening of bids. The following deposit is required for each set of plans and specifications taken out by prospective bidders and will be repaid only upon the timely return thereof in good condition and without marks or annotations: $ 75.00

8. Alternates. Specifications often require the bider to indicate separate alternate bids on the basis of the inclusion, exclusion or substitution of specific items of work, materials or methods. Each "alternate" separately identified in the specifications must be similarly identified in the proposal, and the proposal must clearly show, with respect to each such alternate, the amount to be added to or subtracted from the base bid if the alternate is adopted as part of the contract to be awarded. If the space provided in the bid form for this purpose is inadequate, the alternate bids must be set forth on separate sheets securely fastened as riders to the proposal form. Similar sheets should be used, when necessary, to set forth separate prices for separate items in compliance with the specifications. The amount of a bid with respect to an alternate includes all charges and all adjustments in the base bid and in the main work attending the use of the alternate. Each bidder must comply with additional requirements, if any, in the specifications, relating to alternate bids and to listing of separate prices for separate items. When the specifications permit stated combinations of bids for various items, or alternate bids, the combinations or alternates approved by the Board shall control and shall be bidder. Failure of a bidder to follow the provisions of these instructions and of the specifications relating to alternate, separate or combined prices may result in the rejection of his proposal.

9. Addenda, Bulletins, Interpretations, Instructions, Modifications. No interpretation or modification of, and no instruction made or bulletin or addendum issued with reference to any of the contract documents, prior to the opening of bids, shall be binding unless made or approved by the Board's Business Administator, in writing, and those so made or approved shall be deemed to be part of the specifications and shall control each proposal submitted. It is the responsibility of the bidder to obtain copies of all such documents before he submits his proposal. Every request for interpretations or instructions if subject to rejection unless made in writing and received by the Board's Business Administrator at his office not later than the fourth day preceding the date fixed for the delivery of proposals, and his decisions as to whether a request so received should be met shall be final and binding.

10. Obligation of Bidders. Each proposal shall constitute an offer and agreement to do, furnish and perform the matters and things relating to the category of work therein identified, in compliance with the requirements of the contract documents; to enter into and deliver, as below required, contracts on and in form and content as represented by the prescribed contract form for the performance and completion of the work identified in the proposal, and to deliver the executed performance bond mentioned below.

11. Delivery of Executed Contracts. Notice of the Board's acceptance of a proposal or of the award of a contract thereunder will be given to the successful bidder within 45 days from the date fixed for the delivery of proposals. Within 5 days from the date when such notice is given, the successful bidder shall deliver at the office of the Board's Business Administrator 4 copies of the contract between the successful bidder and the Board, executed by the successful bidder as contractor on the prescribed contract forms, with all of the provisions of the said forms included, and with all blank spaces therein completed as the sense of the forms and the terms of the accepted proposal require, and with formal acknowledgment (or proof, in the case of a corporate bidder) of such execution affixed thereto. A copy of the within instructions to bidders and of the applicable plans and specifications shall be affixed to each of the contracts so delivered; but the affixation of the plans and specifications, or either of them, may be waived by the Board's Business Administrator, in which event a copy of those not affixed, signed by the successful bidder, shall be left with the Board's Business Administrator at the time of the delivery of the contracts and shall be identified in the contracts by reference. The successful bidder's copy of the contract, signed by the Board, will be available at the office of the Board's Business Administrator within a reasonable time after the latter's receipt of the contracts completed and executed by the bidder and of the completed and executed performance bond mentioned in section 12 thereof. As to the delivery of the contracts by the successful bidder, completed and executed by him as above required, time shall be of the essence.

12. Delivery of Performance Bond. Within the same time and at the same place specified for delivery by him of his executed contracts, the successful bidder shall deliver a bond in the same amount as the contract price, made and executed by him as principal, and by a surety company licensed to do business in New Jersey, as surety, for the full and faithful performance of all of the contractor's agreements and obligations under the contract, and for payment of all claims for labor, materials, supplies, equipment and other items mentioned in the prescribed bond form and furnished by the contractor and by subcontractors in the performance of the contract. The bond shall be made and executed on the said form which shall be fully completed, shall contain all of the provisions thereof, shall be accompanied by the customary evidence of the sufficiency of the surety and of the authority of the persons signing for the surety, and shall have affixed thereto formal acknowledgment (and proof, in the case of corporations) of the execution thereof by the principal and surety. As to the delivery of the said completed and executed performance bond as above required, time shall be of the essence.

13. Extension of Time. The successful bidder may extend the time for the giving of the Board's formal notice of acceptance of his proposal. The time for his delivery of the contracts executed by him or of his performance bond, may be extended by the Board's Business Administrator, but no such extension for a total of more than 45 days shall be binding unless approved by the Board, and as to any such extended delivery date, time shall be of the essence.

14. Damages for Bidder's Default. If the successful bidder shall fail to deliver the executed contracts and performance bond within the required time, he shall pay to the Board the excess of the amount of the cost to the Board for the work and for the other matters and things which he would be required to do or furnish if he had so delivered the said contracts and bond, in excess of the price specified in the bidder's accepted proposal. The said excess cost shall be paid when the amount thereof has been determined by the Board. If the Board enters into, with others, contracts for the work and other matters and things covered by successful bidder's accepted but defaulted proposal, the aggregate amount payable by the Board under such contracts shall be the basis for computing the Board's excess cost resulting from the successful bidder's default and shall be paid to the Board by the defaulting bidder forthwith after the date when the Board has entered into such contracts. In addition to, but not by way of limitation or reduction of, the amount to be paid for such excess cost, the defaulting bidder shall pay to the Board, as liquidated damages for the delay, inconvenience, and expense occasioned by his failure to deliver the required contract and bond, a sum equal to 5% of the amount of his accepted but defaulted proposal, or $500.00 whichever shall be the lesser, and the said amount shall be due and payable at the time of such bidder's default.

15. Bid Security. To secure payment of the sums payable under the above section 14, each bidder must deliver together with the proposal, in the same sealed envelope in which the proposal is delivered, a certified check payable to the order of the Board for 5% of the largest amount for which a contract may be awarded under the proposal, or a bid bond for the same amount, executed by a surety company licensed to do business in New Jersey, on the form which is part of the proposal form. The said bid bond form must be completed, and the executed bid bond must contain all of the provisions of the form.

All checks, except those of the 3 lowest bidders will be returned within ten days from the date fixed for delivery of proposals. The checks of the 3 lowest bidders, except those of defaulting bidders, will be returned with 10 days after a formal contract has been executed and entered into between the Board and one of them, but not later than 45 days from the date fixed for the delivery of proposals.

16. Qualifications of Bidders: Questionnaire. It is required that each bidder be, on the date fixed for the delivery of proposals, the owner of an operating contracting business for the performance of work such as the work covered by his proposal, and that he possess on the said date, equipment and facilities sufficient to insure the timely completion and the efficient performance of the work to be done; and that he has been and has had experience as the owner of such business for not less than 2 years directly preceding the said date. Proposals from bidders who do not meet these requirements will be subject to rejection. Each bidder must complete, sign, verify and return with his bid the questionnaire which accompanies the within instructions to bidders, and if he fails so to do, his bid will be subject to rejection.

17. Examination of Site and of Contract Documents. At the time of the opening of proposal, each bidder shall be deemed to have inspected the site and to have read and to be fully familiar with the contract documents. The failure of a bidder to acquaint himself with actual conditions at the site or to obtain or examine any of the contract documents shall not relieve him of any obligation with respect to his proposal. The work to be done by the successful bidder as contractor must be integrated with the work to be done under other contracts, if any, relating to the project and he will be required to do, furnish, and perform all things, whether or not specifically indicated in the plans and specifications relating to his proposal necessarily required or implied in order to obtain a completed condition.

18. Permits and Licenses. In Connection with the provision of the contract form relating to permits and licenses, attention is called to the following New Jersey statute:

> R.S.18:11-11. No Board of Education of any school district ... shall be required to secure the approval of its plans and specifications for the erection or alteration of any school building . . . or any part thereof by the municipality therein; nor shall any Board of Education . . . or any contractor doing work in connection with school buildings . . . be required to secure a building permit from the municipality.

19. State Laws and Regulations. In connection with the provisions of the contract form requiring compliance with all laws, the attention of bidders is particularly called to the following sections of the Revised Statutes of New Jersey; R.S.40:15-1 (preference for domestic products); R.S.34:9-1 (employment of aliens forbidden); R.S.34:9-2 (resident citizens to be preferred in employment); R.S.34:10-1 (8 hour day and payment of prevailing rate of wages); R.S.18:12-3 and R.S. 2A:135-6 (interest of board members, etc., in contracts): R.S. 2A-44-148 (money paid to contractor trust fund for claims of subcontractors); and the sections dealing with workmen's compensation, child labor and fair employment practices. The foregoing list of specific laws shall not be deemed to be a limitation of the obligations of the contractor to perform his obligations in full compliance with the provisions and requirements of all federal and state statutes and municipal ordinances applicable to the work to be done under the contract.

The contractor must at all times keep adequate records showing the names of persons employed on the work embraced by his contract; the dates and hours of such employment, separately stated for each person so employed, and the wage rates paid to them during the period of such employment. These records must at all times during the regular business hours be open to and available for inspection of representatives of the Board's Department of Business Administration. The contractor shall submit to the Board's Business Administrator, on forms prescribed or approved by him on Tuesday of each week during the progress of the work, a sworn written statement setting forth the names of persons employed on the work during the preceding week, the dates and hours each of them were so employed, and the wage rates paid to each of them while so employed.

The bidder's failure to pay the prevailing rates of pay as required by law or to comply with the provisions and requirements of any federal or state statute, or any municipal ordinance applicable to the work to be done shall constitute a default under the contract. The contract price payable by the Board under the contract to be made with the successful bidder shall be reduced to the extent of the sum of the following amounts: (a) the difference between the prevailing rate of wage, exclusive of welfare fund contributions, required to be paid in the performance of the contract, under the provisions of R.S. 34:10-1, and the wages exclusive of welfare fund contributions, paid by the contractor to mechanics, workers, or laborers for work done under the contract; and (b) in the case of crafts with respect to which contributions to a welfare fund formed for the benefit of mechanics, workers, or laborers in the craft, are required to be made under the provisions of R.S. 34:10-1 as an element of the prevailing rate of wage, but not otherwise, the difference between the amount of such contributions as so required to be made in connection with work done under the contract, and the amount of such contributions, if any, in fact made by the contractor to such welfare fund on behalf of mechanics, workers, or laborers in such crafts with reference to their work under the contract. The amount or amounts by which the contract price may be reduced in accordance with the foregoing provision shall be payable to the Board by the contractor on demand and may be deducted by the Board from any sum or sums otherwise payable to him under the contract. According to information provided to the Board's Business Administrator of Newark, as of the date of the advertisement hereinbefore mentioned, are as listed in the separate schedule which accompanies the within instructions to bidders.

20. Payment. The successful bidder with whom a contract is made will be paid the contract monies in accordance with paragraph 21 of the form of contract attached hereto.

21. Liquidated Damages for Delay. Attention is called to the provisions of the contract form dealing with liquidated damages for delay in completion of the contractor's work. The per diem amount of such liquidated damages which will be inserted in the appropriate space provided therefor in the contract form is as follows: $ 200.00 Per Diem

22. Time for Commencement and Completion of the Work. The time for commencement and completion of the work which will be inserted in the space provided therefor in the contract form is as follows:

Commencement Date: June 10, 1962

Completion Time:

June 1, 1964

The time for completion is subject to extension under certain conditions. See provisions of paragraph 20 of the contract form.

23. Notices, etc. All notices, demands, bulletins, instructions, etc., to be given to the bidder or contractor by the Board or any of its representatives persuant to any of the provisions of the contract documents shall be deemed to be properly given if served on the bidder or contractor, as the case may be; or if mailed, with or without return receipt requested, by registered mail addressed to such bidder or contractor, either at the address of the bidder given in the proposal or at the last business address known to the Board's Business Administrator or at the contractor's address as stated in the executed contract. Service on any partner shall be deemed to be service on the partnership and service on any officer, agent, or representative of a corporation shall be deemed to be service on the corporation. If the bidder or contractor consists of more than one person such notices, demands, bulletins, instructions, etc., shall be deemed to have been given to each of them, if served upon or mailed to any such person. Notices, demands, or requests to be given by a bidder or contractor to the Board may be served on the Board's Business Administrator or anyone in charge of his office; or may be given by registered mail, return receipt requested, addressed to the Board at 31 Green Street, Newark 2, N. J., and marked for the attention of the Board's Business Administrator. In all cases the day on which the notice, demand, request, instruction, bulletin, etc., is served or mailed shall be counted as one of the days of the time allowed for the giving thereof.

Re-typed November 1962

24. Substitution. Wherever any article, device, product, material, fixture, form or type of construction is specified by trade name or mark, or by the name of any make, manufacturer, or producer, or by any similar exclusive identification in any of the contract documents, such specification establishes the standard of type and quality considered most satisfactory for the purposes of the project. In order that all proposals may be made under the same conditions, proposals shall be based on the specified article, device, product, etc. Another article, device, product, etc., of equal type and quality may be offered for consideration. If, in the opinion of the Board's Business Administrator, the article, device, product, etc., so offered is equal to the originally specified article, device, etc., its use will be approved, provided there has been compliance with the provisions of the specification as to the time within which such offers may be made and as to the submission of samples. In the absence of such approval, only the article, device, product, etc., specified may be used.

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Typed 10/25/62

SCHEDULE OF PREVAILING RATES OF WAGES

TRADE	HOURLY RATE	WELFARE	PENSION
Air Tool Operators (Jackhammerman Vibrators)	$ 2.56		
Asbestos Workers	3.10	3%	
Asbestos Helpers	2.14	3%	
Boilermakers	4.81		
Boilermakers' Helpers	4.53		
Bricklayers (Foreman)	4.95	4%	
Bricklayers	4.90	.20	.15
Cabinet Makers	3.06	4%	3%
Carpenters (Foreman)	5.80	4%	3%
Carpenters	5.05	4%	3%
Cement Finishers	4.30	3%	
Electricians' (Foreman)	5.45	4%	5%
Foreman over 3 to 6 men	Vacation Fund 10%-Natl Benefit Fund 1%		
Electricians	4.90	4%	5%
	Vacation Fund 10%-Natl Benefit Fund 1%		
Electricians' Apprentices	3.40		
Glaziers	4.60	.15 hr.	.15 hr.
Glaziers -Height over 20 ft.	4.80	.15 hr.	.15 hr.
Ironworkers:			
Apprentices	4.32½	3%	
Journeymen	4.70	3%	5%
Straight Time Men:			
Pushers	4.40	3%	5%
Foremen	5.07½	3%	5%
Superintendents	5.32½	3%	5%
Labor Foreman	4.05		
Laborers	3.75		
Bldg. Laborers - Hod Carriers	4.00		
Lathers	4.00		
Foremen	4.30		
Mason Tenders	3.35		
Mason Plasterers	4.65	4%	.15 hr.
Millworker - Cabinet Makers	2.94	4%	3%
Mortar Mixers	3.35		
Painters:			
Ordinary Painting & Decorating	4.20	.20 hr.	.16 hr.
Exterior, exceeding 3 stories & interior painting higher than 20 ft. above ground or floor	4.35	.20 hr.	.16 hr.
Painting of Bridges, Radio Towers & Water Towers, etc.	4.80	.20 hr.	.16 hr.
Plaster Foreman	4.95	3%	
Plasterers	4.65	3%	
Plasterer Tender	3.35	3%	

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SCHEDULE OF PREVAILING RATES OF WAGES

TRADE	HOURLY WAGE	WELFARE	PENSION
Plumber Foreman	$ 5.20	3%	3%
	Educational Fund 1%-Vacation Fund 4%		
Plumbers	4.70	3%	3%
	Educational Fund 1%-Vacation Fund 4%		
Power Equipment Operators: Engineers on backhoes, draglines, Keystones, shovels, trench machines, trench shovels, cranes, pavers, derricks and cableways	4.20		
Power Equipment Operators: Engineers on Building Hoists	4.00		
Maintenance Engineers	3.50		
Firemen	3.00		
Bulldozers & Tractors	3.52½		
Oilers & Junior Engineers	3.00		
Pumps, Compressors, Small Mixers	3.75		
Engineers on Steel Erection	4.40		
Roofers, Composition - Foreman	4.85	.15 hr.	.15 hr.
Roofers, Composition	4.55	.15 hr.	.15 hr.
Sheetmetal Workers	4.75	3%	3%
	Vacation Fund 3%		
Soft Floor Layers	4.15		
Steamfitters:			
Journeymen	4.70	3%	3½"
	Educational Fund ½%-Vacation Fund 4%		
Foremen	4.75	3%	3½%
	Educational Fund ½%-Vacation Fund 4%		
General Foreman - Assistant	5.00	3%	3½%
	Educational Fund ½%-Vacation Fund 4%		
General Foreman	5.25	3%	3½%
	Educational Fund ½%-Vacation Fund 4%		
Helpers:			
1st year - 35% of journeyman's rate			
2nd year - 50% of journeyman's rate			
3rd year - 60% of journeyman's rate			
4th year - 70% of journeyman's rate			
5th year - 80% of journeyman's rate	3.76	3%	3½%
	Educational Fund ½%-Vacation Fund 4%		
Stone Masons	4.30		
Tile Setters	3.72½	5%	
Terrazzo and Mosaic	3.95	3%	3%
Truck Drivers	2.65		
Truck Drivers, Trailers, Euclid	2.62½		
Truck Drivers, Winch	2.62½		
Truck Drivers, Dump	2.50		

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

ESSEX COUNTY BUILDING and CONSTRUCTION
TRADES COUNCIL, LOCAL NO. 52 OF THE
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, DOMENICK De SANTIS and
VALENTINE ELECTRIC COMPANY, INC.,

Plaintiffs,

vs.

Action at Law

GEORGE C. RICHARDSON, JOHN W. P.
COLLIER, JR., NEWARK COORDINATING
COUNCIL, CONGRESS OF RACIAL EQUALITY,
ROBERT CURVIN, and ROBERT BENDER,

COMPLAINT

Defendants.

1. Plaintiff, Essex County Building and Construction Trades Council, hereafter referred to as Plaintiff Council, is an unincorporated association of affiliated local labor unions, all of which are unincorporated associations of persons employed in the building and construction industry in Essex County, New Jersey. Plaintiff Council exists for the purpose of representing its affiliated local unions in matters of common interest to them.

2. Plaintiff, Local 52 of the International Brotherhood of Electrical Workers, hereafter referred to as "Local 52", is one of the local unions affiliated with the Plaintiff Council. It is a union of skilled electrical workers, many of whom are presently employed on the construction job known as the "Barringer High School" job. Local 52 brings this action as a class action, on its own behalf and on behalf of all other unions similarly situated.

3. Plaintiff Domenick De Santis is a journeyman electrician, presently employed on the Barringer job by the Valentine Electric Company, Inc., an electrical contractor under contract with the Board of Education of the City of Newark. Plaintiff De Santis brings this action as a class action, on his own behalf and on behalf of all other persons presently employed or who may in the future be employed under

similar circumstances or similarly situated.

4. Plaintiff, Valentine Electric Company, Inc., is an electrical contractor presently engaged in performing construction work on the Barringer job under contract with the Board of Education of the City of Newark. It brings this action as a class action on its own behalf and on behalf of all other construction contractors similarly situated.

5. Defendant Newark Coordinating Council, hereafter referred to as the "Defendant Council," is an unincorporated association of several groups or associations of individuals interested in supporting and advancing the civil rights of minority groups, principally Negroes. Its chairman is the defendant John W. P. Collier, Jr., and its coordinator is the defendant George C. Richardson.

6. Organizations and individuals affiliated with and cooperating with the defendant Council, and acting in concert with the defendant Council, to the plaintiffs' best knowledge and belief are the following defendants: Congress On Racial Equality, Newark Branch, known as CORE, whose representatives in Essex County are the defendants Robert Curvin and Robert Bender; and others whose names are not presently known to plaintiffs. On information and belief, all said organization has been and are acting in concert with defendant council, and defendants Collier and Richardson in all activities hereinafter referred to.

7. The affiliated local unions of plaintiff Council are the legally recognized collective bargaining agents of all of the employees of all of the contractors on the Barringer job. In almost all cases, they maintain exclusive hiring halls pursuant to lawful contracts with said contractors, and under said collective contracts are obligated to refer to said contractors qualified mechanics in their special trades or crafts. Pursuant to their contracts, qualif

and skilled mechanics have been referred in large number to said contractors for employment on that job. Said mechanics have been employed and are now working on said job.

8. The defendants, and especially defendant Richardson and defendant Council, have, in concert with many hundreds of persons who have been recruited by said defendants for the purpose, since prior to July 3, 1963, attempted to interfere with and deprive plaintiffs of their contractual rights between the contractors and the Board of Education, and of the benefits of the employment by the contractors of the persons presently employed. Pursuant to this desire, they have performed the following acts:

9. On July 3, 1963, under the leadership of defendant Richardson and the defendant Council, they did engage in violent and mass picketing, physically interfering with ingress and egress at the site of construction, so that many of the employees represented by the plaintiffs were unable to pass through the picket line, many of the trucks bringing material and supplies without which the job cannot progress were unable to make deliveries. As a result thereof, under the orders of the Board of Education, construction was halted for a few days, causing irreparable hardship and economic loss to the contractors and the employees represented by plaintiffs.

10. On and before Monday, July 29, 1963, defendants presented demands upon plaintiff Council, and to its affiliated unions, demanding the performance of certain acts by said unions which were and are illegal and which, if accomplished, would be a violation of the laws and public policy of the State of New Jersey and the United States of America. These demands, and the reasons that their objectives are illegal were in part as follows:

(a) That the unions with apprenticeship programs must accept "a number of qualified applicants from minority groups proportionate to their number in the population of the city, that number doubled in the light of the fact that the non-white employment rate is double that of white workers ------." This demand is illegal in that it violates the Statutes of New Jersey prohibiting discrimination in apprenticeship because of race or color.

(b) That "tests" (for journeymen) "will be given in each craft at least once every two weeks, as long as applicants are available, until such time as the Negro and Puerto Rican workers approximate their population in the community." This again is a demand for discrimination in favor of Negroes and Puerto Ricans and against white applicants, in violation of the anti-discrimination laws of New Jersey.

(c) That Negroes and Puerto Ricans be qualified as journeymen tradesmen in a more liberal manner than required for white applicants, and that they be preferred for employment as against all persons not resident of the City of Newark. This demand is a violation of the Labor-Management Relations Act of the Federal Government (the Taft-Hartley Act).

(d) "The immediate hiring of qualified Negro and Puerto Rican workers on all construction jobs in Newark under city contract or sponsorship." This would require discrimination in favor of Negroes and Puerto Ricans against qualified persons who have already applied for such employment and have not yet been employed. Such discrimination would be in violation of the Taft-Hartley Act and also of the state law against discrimination.

(e) That "the unions agree that on city construction projects the number of Negroes and Puerto Ricans employed will not be less than 50% of the total work force." This would constitute a violation of the state laws against discrimination, since it would require employment on the basis of nationality or race rather than qualifications.

(f) "That special preference on the letting of city contracts be given to contractors in the Newark area, and that contractors having an integrated work force be given preferential treatment." This would constitute a violation of the state laws requiring the advertisement of contracts, the bidding on contracts, and the granting of contracts to the lowest responsible bidder.

11. On Monday, July 29, 1963, the defendants and many other individuals acting in concert with them recommenced picketing at the Barringer job site with various kinds of picket signs claiming that Negroes were discriminated against on the job. Plaintiffs recognize the right of any person or organization to picket peacefully for lawful objectives, and do not, in their demand for relief, press the point that said signs were untruthful. On the twenty-ninth day of July, 1963, the activities of the defendants were peaceful and not violent, as distinguished from the picketing on July 3 when said picketing consisted of mass picketing and violence. However, the pickets also designed and announced as having as its objective the unlawful and illegal purposes described in Paragraph 10 hereof.

12. On July 30 and July 31, 1963 said peaceful picketing continued having as its objective the unlawful purposes set forth in Paragraph 10 hereof. However, on July 30 and July 31 the defendant Richardson and the defendant Curvin speaking on behalf of all defendants herein announced that commencing either on August 1 or shortly thereafter the picketing would no longer continue to be peaceful but that the pickets would engage in forceful activity to prevent ingress and egress to the job site and in particular would lie down on the streets or stand in the streets for the purpose of preventing ingress and egress of trucks and other vehicles bringing materials and supplies to the job. In fact, the defendant Curvin further stated that their would be sit downs and lie downs to block the way of trucks. Defendants also stated that the time of picketing would be changed from day to day to 'keep the

police off balance." Such activity on the part of the defendants constitutes a violation of the public peace and dignity.

13. Defendants by their threatened actions of violence and physical interference with the conduct of the construction work at the Barringer site and by their engaging of picketing for the unlawful purposes alleged in Paragraph 10 hereof will constitute substantial and irreparable injury to all of the plaintiffs and to all of the members of the classes whom the plaintiffs represent in that:

(a) Valentine Electric Company, Inc. and all other contractors on the job will be interfered with and irreparably damaged financially by the defendants unlawful interference in the contractual rights which they enjoy under their contracts with the Newark Board of Education.

(b) Plaintiff De Santis and all other employees on the construction site will be irreparably damaged by the loss of their opportunity to perform the work with respect to which they have een employed and by the unlawful interference of the defendants with heir employment opportunities.

(c) Local 52 and all other local unions whose members re employed on said job will be irreparably damaged by defendants nlawful interference with their contractual rights established y their collective bargaining agreements with the contractors.

(d) Plaintiff Council will be irreparably damaged the defendants' interference with its business relationships behalf of its affiliated unions with all of the contractors volved on the Barringer site and upon other sites of construction ich may equally be affected.

Wherefore, plaintiffs demand judgment against the fendants and against all others acting or working in concert or combination with them as follows:

(a) Enjoining and restraining them from parading or patrolling, loitering or picketing or demonstrating in on or about the Barringer construction site or any other construction site where the plaintiffs or any of the classes represented by them are employed for the purposes described in Paragraph 10 of this Complaint.

(b) Enjoining and restraining them from parading, patrolling, loitering, picketing or demonstrating at the Barringer construction site or at any other construction site in which any of the plaintiffs or those of the classes represented by them are employed in a manner so as to prevent or interfere with, by force of numbers, by sit downs or lie downs, or by any physical means other than by persuasion alone, the ingress or egress of any person or of any vehicle who or the driver or which desires to enter or leave said premises.

PARSONNET & PARSONNET
Attorneys for Plaintiffs

BY:________________________
THOMAS L. PARSONNET

STATE OF NEW JERSEY:
: ss
COUNTY OF ESSEX :

LOUIS VEHLING, being of full age duly sworn according to law upon his oath deposes and says:

1. I am the President of the Essex County Building and Construction Trades Council, one of the plaintiffs herein and also I am the Business Manager of Local 52, another of the plaintiffs herein. I have read the Complaint to which this Affidavit is attached and do say that the same is true to the best of my knowledge and belief. The description of the picketing is derived from my personal knowledge. Attached hereto are photographs taken, as indicated thereon, on the dates mentioned thereon, indicating the nature of the picketing.

2. Attached hereto and marked Exhibit A is a Memorandum presented to the Plaintiff Council by the defendant Council and cooperating organizations setting forth the demands of the defendant Council for the accomplishment of which demands the picketing described in the Complaint has been and will, unless restrained and enjoined, continue to be conducted.

LOUIS VEHLING

Sworn to and subscribed
before me this 1st day
of August, 1963.

EXHIBIT A

MEMORANDUM

TO: Union Negotiation Committee

FROM: Citizen Negotiating Committee

SUBJECT: Proposal for Implementing Integration in the Building Trades Unions on all City Supported Building and/or Maintenance Project

The Citizen Negotiation Committee (herein after called the Citizen Committee) appointed by Mayor Hugh J. Addonizio on July 11, 1963 hereby presents to the Union Negotiation Committee, also appointed by Mayor Addonizio, the following background leading to the appointment of the Citizen Committee and in addition a list of items upon which negotiation between the Union Negotiation Committee and the Citizen Negotiating Committee are to be based in compliance with Mayor Addonizio's request.

All objective evidence and data gathered by the Citizen Committee including the report of the Newark Human Rights Commission indicate that job discrimination based on race does exist in the Building Trades Labor Unions in our area, and that restricted practices in apprenticeship and on-the-job training program combined to make permanent such discrimination by labor unions in the Newark area. Because these practices are not only unconstitutional but also place an unreasonable hardship and economic proscription on Negroes, the Citizen Negotiation Committee does hereby firmly request the Union Negotiating Committee consider these specific items that follow as points for negotiation in good faith in an effort to eliminate racial discrimination in employment in the local trades unions.

The Citizen Negotiation Committee recommends that:

1. The immediate hiring of qualified Negro and Puerto Rican workers on all construction jobs in Newark under City Contract or Sponsorship.

2. A determination be made of the number of Negro and Puerto Rican workers can reasonably expect employment immediately based upon the number of public buildings now under contract or planned for construction starting within the next 6 months.

3. The Urban League of Essex County serve as the coordinating agency for compiling, maintaining, and processing all lists of available Negro and Puerto Rican workers. All interested organizations and individuals be required to submit individual names or lists to the Urban League of Essex County for processing.

4. The unions adhere to a policy of strict enforcement by the City of the non-discrimination clause in all City contracts and that the Human Rights Commission be recognized as the enforcement agency with full powers to investigate the operations of the non-discrimination clause in any union contract.

Employment of Journeymen

1. That all barriers to union memberships against Negroes and Puerto Ricans in the construction trades unions be immediately lifted and that the only requirement be the ability of the worker to pass a prescribed entrance test for admittance into the building trades unions of his choice.

2. All tests given be based on criteria established by the United States Department of Labor, or mutually agreed upon impartial agency, and that the tests be administered by same.

3. The applicant be given notice of the results of his test (pass or not) within 24 hours after completion of the test.

4. Should the applicant pass, he immediately be given full membership in the union with all rights and privileges attendant thereto and that such rights and privileges include seniority over any and all journeymen currently working in the city on visitor's temporary card or permit.

5. Applicants for tests or examinations will first register at the Urban League of Essex County where all tests arrangements will be made.

6. Tests or examinations shall be given in each craft at least once every two weeks as long as applicants are available and until such time as the percentage of Negro and Puerto Rican workers reach the approximate percentage of these groups percentage to the population of the city.

7. The building and construction trade unions along with the joint communities will individually and collectively encourage Negro and Puerto Rican journeymen to take these tests.

8. All contractors and unions will be required to register each city job with the Newark Commission on Human Rights and to submit to the Commission periodic reports. These reports shall show the number of personnel currently working in each job category and the number and percentages of those working that are Negroes and Puerto Ricans. These records shall be open for public inspection.

9. The Newark Human Rights Commission shall be mandated by the City Council to approve all contracts which include City funds with respect to and inclusion of an effective non-discrimination clause in all such contracts and for the assurance that the work force on all City supported construction projects shall be fully integrated.

10. The unions agree that on any city construction project the number of Negroes and Puerto Ricans

employed will be not less than 50 per cent of the total work force.

11. Contractors shall be required to give 24 hour notice to the Newark Human Rights Commission of all new job placement with specifications as to race.

Proposal on Apprenticeship Program

1. Unions that do not have a registered apprenticeship program, either through joint union-management committee or separately through the union, should register whatever methods are used to admit apprentices with the Newark Human Rights Commission as a matter of public information. If no regular procedure is available, the union should state the number of apprentices admitted over the past five year period and the method used in admitting each apprentice.

2. Unions with registered apprenticeship programs should accept, as part of the total number of apprenticeships available annually in each trade, a number of qualified applicants from minority groups proportionate to their number in the population of the city, that number should be not less than 60 per cent in light of the fact that the Negro unemployment rate is doubled that of white workers and because an imbalance of decades must be corrected. In unions where no apprenticeship classes are being contemplated, the above proposals should be applied to the existing ratio of helpers or apprentices to journeymen on the job.

3. Unions without formal apprenticeship programs should give public notice, including the nine-man committee described in Section IV of this memorandum, in advance of any openings in the apprenticeship program so that all may have equal opportunity to apply.

Implementation and Enforcement

1. A committee of nine shall be established by the Mayor to aggressively seek and promote greater opportunities for minority groups in apprenticeship and on-the-job training and to act as an implementive, supervisory, and review board in the implementation of this program. The committee shall include 4 representatives from the cross section of organizations representing minority groups, two representatives of labor to be approved by the Building Trades Council, two from Industry to be approved by the Chamber of Commerce or other appropriate body and one public member to be approved by all three. This committee shall report to the Newark Human Rights Commission and shall be established within 10 days after ratification and adoption of these proposals.

2. The Mayor of the City should make every effort to secure additional Federal and State Aid for the City of Newark in every way possible, so as to increase the activity in the areas of needed new housing, schools, roads and other public works to the end that we can stimulate employment and thereby reduce the amount of unemployment now extensive among building trades workers in our City.

3. That special preference on the letting of City contracts be given to contractors in the Newark area, and that those contractors having an integrated work force be given preferential treatment.

4. That the city provide financial relief to contractors to enable additional people to be employed to share the available work, and that the number of apprentices per Journeymen be increased to enable more Negroes and Puerto Ricans to become skilled.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

ESSEX COUNTY BUILDING and CONSTRUCTION
TRADES COUNCIL, LOCAL NO. 52 OF THE
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, DOMENICK De SANTIS and
VALENTINE ELECTRIC COMPANY, INC.,

Plaintiffs,

vs.

Action at Law

GEORGE C. RICHARDSON, JOHN W. P.
COLLIER, JR., NEWARK COORDINATING
COUNCIL, CONGRESS OF RACIAL EQUALITY,
ROBERT CURVIN, and ROBERT BENDER,

Defendants.

ORDER TO SHOW CAUSE

This matter being opened to the Court by Parsonnet & Parsonnet, Esqs. (Thomas L. Parsonnet, Esq.) and upon a reading and filing of a Complaint with Affidavit thereto annexed, good cause appearing, it is on this day of , 1963

ORDERED that the defendants George C. Richardson, John W. P. Collier, Jr., Newark Coordinating Council, Congress of Racial Equality, Robert Curvin, and Robert Bender, all show cause on the day of , 1963 or as soon thereafter as counsel may be heard, why the defendants and all other persons acting or working in concert or in combination with them should not be enjoined and restrained:

(a) From parading, patrolling, loitering, picketing, or demonstrating in on or about the construction site of the Barringer High School Annex or any other construction site where the plaintiffs or any of the classes represented by them are employed, with an object of forcing, requiring or persuading the plaintiffs or any other persons to provide employment to Negroes or Puerto Ricans or any other minority groups on the basis of their race, nationality or color rather than on the basis of individual qualifications for work to be performed and priority of applications for such employment or for the purpose of securing preference in employment for any person or persons based upon his or their race, nationality, or color or for the purpose of securing preference for contractors of the Newark City Board of Education or any other public body upon any basis other than the method provided by law for the granting of such contracts.

(b) From parading, patrolling, loitering, picketing or demonstrating at the Barringer construction site or at any other construction site in which any of the plaintiffs or those of the classes represented by them are employed in a manner so as to prevent or interfere with, by force of numbers, by sit downs or lie downs, or by any physical means other than by persuasion alone, the ingress or egress of any person or of any vehicle who or the driver of which desires to enter or leave said premises, and it is further

ORDERED that a copy of this Order to Show Cause and of the Complaint filed herein be served upon said defendants and each of them within days from the date hereof.

JUDGE SUPERIOR COURT
CHANCERY DIVISION

Superior Court of New Jersey
Chancery Division

ESSEX COUNTY BUILDING and CONSTRUCTION TRADES COUNCIL, LOCAL NO. 52 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, DOMENICK De SANTIS and VALENTINE ELECTRIC COMPANY, INC.,

Plaintiffs,

vs.

GEORGE C. RICHARDSON, JOHN W. P. COLLIER, JR., NEWARK COORDINATING COUNCIL, CONGRESS OF RACIAL EQUALITY, ROBERT CURVIN and ROBERT BENDER,

Defendants.

Action at Law

AFFIDAVIT

STATE OF NEW YORK :
: ss
COUNTY OF NEW YORK :

LEO PFEFFER, of full age, being duly sworn on his oath according to law, deposes and says:

1. I am an attorney and counsellor at law with offices located at 15 East 84th Street, New York 28, N. Y. I am duly admitted to practice before the Courts of the State of New York and the Supreme Court of the United States. With the leave of this Court I am counsel for the defendants in this action and submit this affidavit in opposition to the plaintiffs' application for an injunction against picketing in support of the defendants' efforts to eliminate racial discrimination by the plaintiffs herein.

2. Because of the shortness of time it is not possible to submit a complete memorandum detailing in full the bases upon which the defendants rely for the denial of the application and ultimately also for the dismissal of the complaint. The purpose of this affidavit is, therefore, to set forth in brief the grounds upon which the defendants will rely in opposition to the plaintiff's

application and to the suit. At the hearings on this application, deponent will request this Court for leave, should the Court find it necessary, to submit a more detailed memorandum setting forth the authorities, constitutional, statutory and judicial, relied upon by the defendants. This affidavit supplements the affidavits of the defendants George Richardson and John W. P. Collier, Jr., submitted simultaneously herewith.

3. The plaintiffs' application herein is for an injunction unlimited in duration. Obviously such an injunction is obtainable only after a full trial of the issues as fixed by the pleadings. We do not assert this defect as ground for denial of the application. We will assume that the plaintiffs are applying at this time for no more than an interlocutory injunction, and we proceed accordingly.

4. Paragraphs 10(c) and 10(d) allege that the picketing of the defendants sought to be enjoined in this proceeding violates the Labor Management Relations Act of the Federal Government (Taft-Hartley Act). We suggest that this allegation may well operate to deprive this Court of jurisdiction of this entire suit. The Federal act provides specific procedures for the resolution of disputes arising out of asserted violations of its terms. The recent decisions of the United States Supreme Court in Marine Engineers Beneficial Association v. Interlake Steamship Co., 370 U. S. 173 (1962), Local 438 Construction and General Laborer's Union, AFL-CIO v. S. J. Currey, 371 U. S. 542 (1963) and San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) all indicate that the Federal act, at least initially, is preemptive in its operation and that accordingly the remedy of the plaintiffs herein lies, if anywhere, with the National Labor Relations Board.

5. Assuming that this Court does have jurisdiction of the present suit and application, we submit that it may be exercised only in the most extraordinary circumstances and only in the presence of a clear and practically

indisputable case establishing the plaintiffs' right to the relief sought. This is so first, because injunction by its very nature is an extraordinary remedy to be granted only in extraordinary circumstances, and secondly because plaintiffs are seeking to invoke this extraordinary remedy in advance of a full trial in which the controverted factual and legal issues between litigants are ordinarily determined. We submit that the plaintiffs here are far from being able to establish their case according to the standards applicable to such proceedings.

6. Completely aside from this general equitable principle, the legislature of this State has decreed that no temporary injunction may be issued in cases such as this until the Court has had an opportunity to hear the testimony of witnesses on both sides. Under Section 2A:15-53, "No court of the state of New Jersey nor any judge or judges thereof shall issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered. . . ." Under Section 2A:15-58(c) it is quite clear that the present controversy constitutes a "labor dispute." The affidavits of the defendants George Richardson and John W. P. Collier, Jr., submitted herewith, show quite plainly that there are controverted factual issues involved. Defendants assert further that in their answer to the complaint herein they will deny the essential allegations of the complaint and will plead affirmative defenses and counterclaims. Finally, defendants assert that they will present testimony controverting the allegations of the complaint at any hearing or trial in this suit.

7. Completely independent of and in addition to these procedural objections, we submit that as a matter of substantive law, the plaintiffs are not

entitled to the relief prayed for in the complaint or upon this application. And this is so even if every allegation asserted in the complaint is deemed to be true.

8. The picketing complained of by the plaintiffs arises out of the widespread discrimination against Negroes and Puerto Ricans in the building and construction industries. This discrimination is long-standing and notorious. It is admitted by Vincent J. Apruzzese, General Counsel of the Building Contractors' Association of New Jersey in an article entitled, "Discrimination - the Law of the Land versus the Law of the Land," appearing in the July, 1963, issue of Labor Law Journal. The defendants assert and will allege in their answer to the complaint herein that the plaintiffs are, and for many years have been, guilty of such discrimination. That plaintiffs are guilty of such discrimination has been found prima facie by the City Human Rights Commission after a careful investigation. Indeed, the plaintiffs do not deny this finding and in fact admit it for all practical purposes.

9. It need hardly be noted that such racial discrimination on the part of plaintiffs violates both the statutes and the public policy of the State of New Jersey - ironically the very statutes invoked by the plaintiffs as the basis of their complaint. Nowhere in their complaint do the plaintiffs assert that they will discontinue these discriminatory practices; nor do they offer to discontinue them should the Court grant them the injunction they seek. In other words, and put bluntly yet accurately, what the plaintiffs are asking this Court to do is to stop the defendants from picketing so that the plaintiffs may continue unmolested in their own unlawful practices.

10. Ever since courts of equity were established in the Anglo-American legal system, equitable relief has been denied to suitors who come into court with unclean hands. A court of equity will not use its extraordinary powers

in aid of one who is himself violating the law he seeks to invoke against his adversary. This is especially so where, as in the present case, the plaintiffs' conduct controvenes strongly expressed policy both of our nation and of the State.

11. Independent of and in addition to this general equitable principle, there is the specific mandate of the New Jersey statute. Section 2A:15-54 provides expressly and unqualifiedly that "No restraining order or injunctive relief shall be granted to any plaintiff who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question. . . ." This provision of itself requires a denial of the plaintiffs' application.

12. There is another reason of important public policy for the denial of the application. Picketing is a form of expression, protected by both constitution and public policy in our nation and the State of New Jersey. Of course, like all expression, it is subject to certain limitations within the police power of the State; but these limitations are the exception rather than the rule. They may not be invoked except in the presence of a clear and immediate danger to the public peace and safety. We submit that this is not present here.

13. The only claim of unlawful picketing - aside from the alleged objective of the picketing - asserted by plaintiffs occurred on July 3. Defendants emphatically deny that the picketing on that day was unpeaceful or otherwise unlawful. But even if the plaintiffs' version of the facts is correct, they are not entitled to injunctive relief. By their own admission the occurrence of July 3 was an isolated incident. They concede that the picketing on July 29 was peaceful and not violent. No court of equity will issue an injunction on the basis of a single incident, as in the present case.

14. Even in respect to the July 3 picketing, it is asserted by the defendants and not denied by the plaintiffs that the police were able to handle adequately any disturbance that might have arisen and to assure unhindered access to and

egress from the picketed places. In such circumstances, it is well-established law that equity will not issue an injunction. A court of equity is not and was never intended to be a substitute for the corner policeman.

15. The statute, Section 2A:15-53, precludes issuance of an injunction in the absence of proof of "substantial and irreparable injury to plaintiffs' property." No such proof has been presented or even offered here, and until it is shown conclusively that the police are unable to handle the situation, no such proof is possible.

16. The defendants emphatically deny, and will deny in their answer, that the purpose of their picketing is illegal or contrary to the law or public policy of either the State of New Jersey or the United States of America. On the contrary, the objective of the picketing is fully consistent with State and national law and public policy. The one and only objective of the picketing is to bring about the equality of all Americans guaranteed by the Fourteenth Amendment of the Federal Constitution, the policies of the national government, the New Jersey Constitution and the State laws against discrimination. The defendants have offered time and again and repeat the offer now to stop all picketing and demonstrations if the plaintiffs will give satisfactory assurances that racial discrimination will be abandoned and full equality achieved for all.

17. The plaintiffs base their case in respect to illegal objectives exclusively on the Memorandum from the Citizen Negotiation Committee to the Union Negotiation Committee, annexed as Exhibit A to the complaint, or more accurately to one or two isolated sentences in that Memorandum. It is not alleged, indeed it is expressly denied by plaintiffs themselves, that any illegal objective or purpose was set forth in any of the picket signs used either on July 3 or July 29 or at any other time. In any event, the defendants explicitly deny that any of the picket signs called for anything but the

elimination of racial discrimination and the achievement of equality. (In this respect, the present case is critically different from Hughes v. Superior Court, 339 U. S. 460, 1950.)

18. The Memorandum shows on its face that it was not submitted by the defendants but by the "Citizen Negotiation Committee" and that this Committee was "appointed by Mayor Hugh J. Addonizio." The plaintiffs do not indicate by what logic or reasoning the defendants herein are to be held responsible for any proposals contained in a memorandum made by a committee appointed by the Mayor.

19. The Memorandum, no matter whose document it is, shows clearly on its face that the only objective sought to be achieved is "to eliminate racial discrimination in employment in the local trade unions." To achieve this end the Committee made certain recommendations. They were not demands; the Memorandum itself uses only the word "recommends." The plaintiffs apparently take exception to one or two of these recommendations. In ordinary good faith negotiations the plaintiffs would have expressed their unwillingness to accept these items and would have proceeded to other matters of dispute. Instead, they rushed from the negotiating room to the courtroom and, pulling completely out of context one or two sentences, request the Court to issue an injunction against the defendants.

20. The law favors the resolution of disputes through negotiation and agreement. This purpose would be seriously frustrated if suggestions or recommendations made in the course of negotiations seeking a settlement of a dispute could be used as the basis for a separate court action. See particularly Winfield etc. Corp. v. Middlesex etc. Corp., 39 N. J. Super. 98-101 (1956).

21. Here, again, completely independent of and in addition to general policy, we have a specific expression of the State legislature. Section 2A:15-54 expressly provides that "No restraining order or injunctive relief shall be granted to any plaintiff. . . who has failed to make every reasonable effort to

settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." The defendants assert, and in their answer will plead, that the plaintiffs have refused and continued to refuse to negotiate in good faith for the settlement of the dispute involved in this suit.

For these and other reasons, deponent respectfully submits that the application for an injunction should be denied.

SWORN to and subscribed before me
this 12th day of August, 1963.

Leo Pfeffer

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

ESSEX COUNTY BUILDING and CONSTRUCTION TRADES COUNCIL, LOCAL NO. 52 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, DOMENICK De SANTIS and VALENTINE ELECTRIC COMPANY, INC.,

Plaintiffs,

Action at Law

AFFIDAVIT

vs.

GEORGE C. RICHARDSON, JOHN W. P. COLLIER, JR., NEWARK COORDINATING COUNCIL, CONGRESS OF RACIAL EQUALITY, ROBERT CURVIN, and ROBERT BENDER,

Defendants.

STATE OF NEW JERSEY :
ss
COUNTY OF ESSEX :

GEORGE RICHARDSON, of full age, being duly sworn on his oath according to law, deposes and says:

1. I am a defendant in the above entitled matter. I submit this affidavit in opposition to the plaintiffs' application for an injunction against picketing by the defendants.

2. The Newark Coordinating Council was organized in late May to coordinate efforts by civil rights groups in the Greater Newark area interested in remedying the effects of discrimination and segregation based on race, color, or creed. Charter members included: The Congress of Racial Equality (CORE), the Greater Newark Political Association, the Interdenominational Ministers Alliance, Local 699 of the Hod Carriers Union, Local 889 of the Asphalt Workers Union, the Newark Chapter of the Negro American Labor Council, the United Essex Civic Association, and the United Ministers for Progress. Since the formation, the Essex County Chapter of Americans for Democratic Action, (ADA), and the William D. Payne Association have affiliated with the Newark Coordinating Council.

3. Due to the extraordinarily high rate of unemployment among Negroes and Puerto Ricans in the area, it was decided by the Newark Coordinating Council to concentrate initial efforts on expanding job opportunities for Negroes and Puerto Ricans, primarily in areas it was felt where long standing discriminatory practices had severely curtailed such opportunities. Furthermore, it was decided as a first step to initiate a campaign to eliminate discrimination in employment opportunities wherever public funds were subsidizing such discrimination.

4. In order to focus the community's attention on the problem, the Coordinating Council decided June 9, 1963, to picket the Newark, New Jersey City Hall beginning June 10 specifically to protest discrimination against Negroes and Puerto Ricans in the work force on city-sponsored construction jobs.

5. Major Addonizio of Newark invited picketers into his office on June 10 and I served as spokesman. We demanded that appropriate steps be taken with a view of eliminating discrimination in the construction trade unions and industry. At this time Mayor Addonizio was asked to stop work on all city construction jobs, including Barringer, until racial discrimination in the selection of the work force is eliminated and full equality is achieved. We said we would picket all such projects including Barringer beginning July 10, if work was not halted or the discrimination was not eliminated. Mr. Addonizio said he would set up a meeting with representatives of the city, the construction unions and contractors, and the Newark Coordinating Council "to open up negotiations to arrive at a satisfactory solution." The Mayor said he would call such a session within ten days. Norman Schiff, Newark Corporation Counsel, asked how many representatives the Coordination Council would send to the session and we told him eight representatives would be there.

6. By June 19, we had received no word from the Mayor's office. I sent a telegram to Mayor Addonizio asking why he had sent us no word in view of his commitment to call the meeting within ten days. In the telegram I stated the Coordinating Council would not feel obligated to wait until July 10 to initiate picketing at the Barringer High School annex construction site where work was then progressing, inasmuch as the Mayor wasn't fulfilling his commitments.

7. The next morning, Deputy Mayor Paul Reilley telephoned me and said the Mayor had had difficulty arranging for union representatives to come to such a session but a meeting would be held "in the next day or so." The following day (June 21) I received a telegram informing me a meeting would be held June 27.

8. (a) The Rev. John Collier, Robert Bender, Thomas Edwards, Clarence Horton, Duke Moore, and I were at the meeting of June 27 hopeful that fruitful negotiations with a view toward settling the problems of segregated work forces could be held. When we arrived, we found about 75 representatives of building and construction unions, representatives of the press, and assorted other individuals in attendance.

(b) The Mayor opened the meeting and read a prepared statement recommending the problem of segregated work forces be handled by the state. He promised rigid enforcement of the anti-discrimination clause contained in all city contracts and pledged to halt work on all city sponsored projects where after an investigation, segregated work forces had been found to prevail.

(c) I pressed the Mayor to take action and live up to his responsibilities as an elected official; in particular that he take the necessary steps for remedying the immoral and illegal discriminatory conditions that prevailed.

(d) One of the union leaders, a Mr. Weber, speaking for more than an hour, said the only problem was lack of sufficient work. He failed to mention at any time the segregated work forces or suggest any alternative remedies. A Mr. Purcell representing a carpenters union denied the existence of segregated work forces.

9. On June 29, the Coordinating Council adopted a resolution which was submitted to the Mayor complaining of discrimination and the prevelance of segregated work forces at the Barringer site and calling upon the Mayor to fulfill his pledge and immediately halt work at the site. The letter was mailed to the Mayor. In the letter, the Mayor was informed picketing would begin immediately if work was not halted.

10. No response to the letter was ever received. It was thus decided by the Coordinating Council to begin picketing at the Barringer site July 3.

11. On July 2 the Coordinating Council held an all night meeting when the non-violent concept of the protest action philosophy and techniques were explained to our picketers. The film "Freedom Ride" was shown. Also a throw-away specifically calling for non-violent behavior was distributed.

12. (a) I arrived at the Barringer construction site on July 3 at about 6:40 a.m. There were about 200 people from our group there. From 6:30 a.m. to 7:00 a.m. picketing in front of the entrances to the construction site was conducted. During this period, several workers approached the picket line but upon being informed of picketers' purpose, they voluntarily turned back, with the exception of one worker who went through.

(b) As planned, picketers sat down at 7:00 a.m. although a few, mostly women, remained standing in place. Shortly afterwards, a force of about 20 policemen charged the line with clubs outstretched and pushed their way through, opening a hole in the line. Construction workers followed through without interference by any picketer.

(c) To the best of my knowledge, no picketer committed any act of violence.

13. It was reported by the press that Mayor Addonizio then recommended work be halted pending an investigation by the City Human Rights Commission and that Harold Ashbey, President of the Board of Education, called the Board into immediate session. It was further reported that the Board of Education voted unanimously to halt work as of midnight July 3. The Coordinating Council then called off the picketing.

14. On the morning of July 5, a news reporter called me and said work had been resumed. I called other officers of the Coordinating Council and proceeded to the Barringer site. Upon arrival about 8 a.m. work was in progress. The contractors claimed they had received no notification to stop work. I called Mr. Ashbey and asked if telegrams to contractors had been sent. He said they had been. I asked Mr. Ashbey to take all necessary steps to insure compliance with the Board's ruling. He promised to come to the site immediately. During this time about 75 picketers were gathering about the site. Mr. Ashbey arrived and spoke with the contractors. About 11 a.m. Mr. Ashbey told me the work was halted and I thereupon requested the picketers to disperse and that there be no further picketing while the work was halted. These requests were complied with.

15. On the evening of July 9, I attended the Human Rights Commission hearing when charges of segregated work forces were investigated.

16. The Newark News reported that upon receiving a report from the Human Rights Commission that found probable discrimination at the Barringer job, the Mayor ordered work resumed and called for negotiating sessions. The Mayor did not invite the Coordinating Council to send representatives to the planned session. Some Coordinating Council officials were invited as individuals to attend the sessions. The Coordinating Council decided to discontinue picketing until it could be learned if the Mayor and the union leaders intended to negotiate in good faith with a view toward arriving finally at a satisfactory solution.

17. At a meeting of the Coordinating Council on July 21, we were informed by the negotiators, the union representatives had broken a pledge of secrecy and in a statement to the press the union leaders indicated they had rejected every suggestion for settlement, and had no intention of negotiating in good faith, despite their repeated statements to the contrary. We therefore voted unanimously to resume peaceful picketing on July 29.

18. I have been out every work day since July 29, picketing during some period between 7 a.m. and 9 a.m. except August 6th, and to the best of my knowledge no picketer has committed an act of violence.

19. No picketing sign carried by any picketer called for anything but the achievement of equality and the elimination of discrimination.

Sworn to and subscribed
before me this day
of , 1963.

George Richardson

Superior Court of New Jersey
Chancery Division

ESSEX COUNTY BUILDING and CONSTRUCTION TRADES COUNCIL, LOCAL NO. 52 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, DOMENICK De SANTIS and VALENTINE ELECTRIC COMPANY, INC.,

Plaintiffs,

vs.

GEORGE C. RICHARDSON, JOHN W. P. COLLIER, JR., NEWARK COORDINATING COUNCIL, CONGRESS OF RACIAL EQUALITY, ROBERT CURVIN, and ROBERT BENDER,

Defendants.

Action at Law

AFFIDAVIT

STATE OF NEW JERSEY :
: SS
COUNTY OF ESSEX :

JOHN W. P. COLLIER, JR., of full age, being duly sworn on his oath according to law, deposes and says:

1. I am a defendant in the above entitled matter. I have read the Answer to the Complaint in the matter and the same is true to the best of my knowledge and belief.

2. I attended the June 27 meeting at City Hall, Newark, New Jersey, called by Mayor Addonizio to seek a settlement with the building and construction trade unions and contractors on eliminating segregation in the contractors work forces. I heard Mayor Addonizio pledge to halt work on any city job, including that at Barringer, where investigation showed that the anti-discrimination clause in city contracts had been violated.

3. I witnessed on July 3, 1963, the Newark City police commit violent acts against defendant, Newark Coordinating Council picketers which were completely unprovoked. To the best of my knowledge, no picketer engaged in any act of violence.

4. The Newark News reported that Mayor Addonizio requested the Human Rights Commission to determine whether there was discriminatory hiring practiced on the Barringer High School construction job.

5. I attended the public hearing of the Human Rights Commission on July 9 after which a finding of probable discrimination was made.

6. The Newark News reported that on July 10 the Mayor ordered work resumed at the construction site and that the Mayor called together a negotiating group requesting the unions to name their own negotiators and naming those who should represent the protesting groups.

7. At the first meeting for negotiating held July 15, 1963, several proposals for remedying what all acknowledged was an "unfortunate" situation were suggested. No agreements were reached other than an agreement to hold another session in nine days. Strict secrecy about the conduct of the negotiations was requested and agreed to by all parties. No request was made by anyone to discontinue picketing and no such agreement to discontinue was reached.

8. The Newark News reported that the Mayor issued a statement claiming our negotiators had agreed to refrain from picketing until the next meeting planned for July 24, 1963. Robert Bender informed me that he then sent a letter to which I gave approval to the Mayor denying any pledge to refrain from picketing.

9. I attended the reconvened negotiations at the Mayor's office on July 24. During a break in the sessions and before the union representatives made their positions clear, I was shown by a news reporter a copy of that day's Newark News which stated that the unions had announced their complete rejection of all the proposals offered by the Newark Coordinating Council prior to the meeting to remedy discriminatory practices. We were informed by the reporter that the unions' rejection of all the proposals was released to the press the night before. Later in the session of the 24th, the union representatives agreed, at the suggestion of Mr. Schiff, Newark Corporation Counsel, to increase the numbers of Negroes and Puerto Ricans, working on the Barringer construction job within the next two weeks. The Urban League agreed to furnish names of

potential applicants. No request for a restriction on picketing or demonstrating by the Newark Coordinating Council was requested, implied, or offered by anyone at the negotiating meeting.

10. Due to the obvious fact that the union leaders were refusing to negotiate in good faith and the fact that the Mayor refused to halt work on the project despite his pledge and the law, the Coordinating Council at my urging voted unanimously to resume picketing at Barringer beginning July 29.

SWORN to and subscribed before me
this 12th day of August, 1963.

JOHN W. P. COLLIER, JR.

August 8, 1963

Sanford Gallanter, Esq.
60 Park Avenue
Newark, New Jersey

Leo Pfeffer, Esq.
American Jewish Congress
15 East 84th Street
New York, New York

George Schiffer, Esq.
40 East 49th Street
New York, New York

Dear Sanford, Leo and George:

Enclosed is an uncorrected draft of proposed complaint against Newark Board of Education, et al. Please send me your thoughts.

Thanks.

Regards.

CR:er
enc.

CARL RACHLIN

DRAFT
8-8-63

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS, BUILDING TRADES COUNCIL

I. Plaintiffs are all taxpayers of the City of Newark, residing in said City of Newark, Essex County, State of New Jersey and they bring the causes of action set forth below individually and as a class action in behalf of all other persons similarly situated.

II. (a) Defendant a,b,c,d and e constitute the Board of Education of the City of Newark, Essex County, State of New Jersey, which Board is by virtue of the laws of the State of New Jersey and ordinances of the City of Newark the duly authorized agency to enter into contracts for the construction of schools within the City of Newark and, upon information and belief, has entered into such a contract or contracts on or about with defendants as contractor and subcontractor respectively for the construction of a public high school known by the name and style of Barringer High School located at

(b) Upon information and belief, defendants are the contractor and subcontractor respectively referred to in I(a) above and are engaged in the construction of said Barringer High School located as described aforesaid and have previously hereto and will in the future receive sums of money pursuant to the terms of said construction agreement referred to in I(a) from or at the direction of defendant Board of Education of the City of Newark.

(c) Defendant Essex County Building & Construction Trades Council (take in paragraph 1 of complaint in other case)

(d) That said Essex County Building & Construction Trades Council and/or its affiliated unions, upon information and belief, at the instance and request of defendants contractor and subcontractors have authorized and permitted their members to work upon the construction of said Barringer High School.

(e) That defendant Frederick M. Raubinger mx is the duly constituted Commissioner of Education of the State of New Jersey, and, upon information and belief, is charged with certain statutory authority under the laws of New Jersey over the dispensing and distribution of money to such public bodies as defendants constituting theBoard of Education of the City of Newark.

III Upon information and belief, that the said agreement of construction referred to in I(a) above, amongst other provisions, sets forth that in the construction of said Barringer High School there shall be no discrimination in employment because of race, cread or color in the construction of said Barringer High School.

IV That upon information and belief the defendants x contractors and subcontractorsx respectively as referred to above, and defendants Essex County Building & Construction Trades Council, and its affiliated unions, have, at all timesx referred to herein, and for some time px prior thereto, both collectively and individually, engaged in habitual and systematic discrimination against and exclusion of persons of the negro race and persons of Puerto Rican ancestry so as to prevent the employment of Negroes and persons of Puerto Rican ancestry from working or working in very limited numbers in the building construction industry, or substantial parts thereof, under the aegis of said ~~d~~ defendants and particularly have discriminated against and excluded citizens of the Negro race and citizens of Puerto Rican ancestry from employment in the construction and erection of the said Barringer High School.

V That the defendants constituting the Board of Education of the City of Newark and the defendant Frederick M. Raubinger knew or should reasonably have known of the acts of discrimination against and exclusion of Negro citizens and citizens of ~~Rumm~~ Puerto Rican ancestry as referred to in paragraph III above.

VI That said acts of ~~dxx~~ discrimination and exclusion constitute violations by the defendants herein of the Fourteenth Amendment ~~x~~ to the United States Constitution and paragraph of the constitution of the State of New Jersey and of the Civil Rights Law of the State of New Jersey, R.S. 18:25-4

VII That, accordingly, and for the reasons aforesaid, performance of the agreement of construction between the aforesaid Board of Education and the defendants contractors and ~~x~~ subcontractors, has been illegal, improper and in violation of law and the respective constitutions of the United States and the State of New Jersey, as well as the public policy thereof, all to the detriment of plaintiffs and all persons similarly situated as well as the City of Newark and the State of New Jersey.

VIII That unless restrained by this Honorable Court, such illegal and unconstitutional and improper conduct, as described herein, will continue as aforesaid.

(continued on next page)

IX That upon information and belief based upon the aforesaid, defendent, Board of Education, has made illegal and improper payments, and will continue to make such illegal and improper payment of sums of money, pursuant to the aforesaid construction agreement unless restrained by this Honorable Court.

X That upon information and belief the defendant, Frederick M. Raubinger has given and has not refused to give substantial sums of moneys belonging to the State of New Jersey to the defendant, Board of Education, upon information and belief, part of which money has been or will be used by the said Board of Education as payments in pursuance of the said agreement of construction of said Barringer High School despite the illegal and unconstitutional performance of the aforesaid agreement of construction for Barringer High School.

XI That the Acts of Defendant, Board of Education, and of defendant Raubinger, in their official capacities, constitute illegal and unconstitutional support by instrumentalities of New Jersey acts in violation of both the United States and of New Jersey, and unless restrained, such illegal andunconstitutional conduct by the aforesaid shall continue to the detriment of plaintiffs, individually and in their representative capacities, and that there is no adequate remedy at law, nor have they sought this relief previously.

FOR A SECOND CAUSE OF ACTION

Plaintiffs reallege all previous paragraphs as if fully set forth.

XII That defendants contractors and sub-contractors, in violation of that clause in the aforesaid agreement ~~requiring no discrimination in employment~~ of construction for this aforesaid Barringer High School requiring no discrimination in employment, have knowingly and willingly participated in acts of discrimination against and exclusion of citizens of the Negro Race ~~of~~ and of Puerto Rican ancestry, together with defendants, Essex County, etc., and its constituent member unions.

XIII That upon information and belief, despite the improper performance of the said agreement as described herein, defendants Board of Education have made and will continue payments of money to defendants contractor and subcontractor, and defendant Raubinger has distributed and will continue to distribute monies of the State of New Jersey with knowledge that such money would be used as described herein, and defendants contractor and subcontractor have received and will continue to receive the aforesaid moneys despite the improper and illegal performance by such parties of the aforesaid agreement of construction.

XIV That unless defendants contractor and sub contractors are required to disgorge and return the sums of money previously paid as aforesaid, the exact amount of which are unknown to plaintiff, and unless all defendants are restrained from paying and distributing and/or receiving sums of money in connection, directly or indirectly, with the construction of the aforesaid Barringer High School, plaintiff, individually, and on behalf of all people similarly situated, together with the City of Newark and the State of New Jersey, will suffer and continue to suffer as a result of the sums improperly and illegally paid out to defendants contractor and subcontractor, and that such injury is irreparable, and there is no adequate remedy at law; nor has this relief been sought previously.

Wherefore plaintiff demands judgment against the defendants as follows:

a) That the defendant Board of Education, or anyone under their supervision, direction or instruction be restrained, enjoined and prohibited from paying out or distributing any money to defendants contractor and sub contractor, in pursuance of agreement #   for the construction of said Barringer High School, or from paying out and distributing any moneys on behalf of said defendants either to defendant Essex County, etc., its constituent member unions, or to the individual member of such constituent unions; and that the Contractor, sub-contractor Essex County, etc., its constituent members, or their individual be restrained, enjoined and prohibited from receiving or accepting any such money or moneys paid out in pursuance of the aforesaid agreement for the construction of Barringer High School.

b) That the defendant Raubinger or anyone under his supervision, direction or instruction, be restrained, enjoined or prohibited from paying out or distributing any sums of money or things of value to the defendant Board of Education unless said defendant has been given adequate warranty that such sums will not be used directly or indirectly for any purposes in connection with the agreement for the construction of Barrington High.

c) That defendant Board of Education, contractor and sub-contractor, Essex County, etc., or any of its constituents ~~xx~~ or any of their agents or employees union, ~~gx~~ be restrained, enjoined and/or prohibited from continuing performance of the aforesaid construction agreement concerning the said Barringer High School, unless and until the aforesaid defendants submit to this court a satisfactory proposal for the elimination of all acts of discrimination against and exclusion of Citizens of the Negro Race and of Puerto Rican ancestry from employment, and for the hiring of qualified Negro citizens, citizens of Puerto Rican ancestry in such amounts as will not be merely a token elimination of discrimination.

d) That each of the defendants Contractor and sub-contractor be ordered and directed to return to defendant Board of Education any and all sums received in connection with any work done by said defendants, or any of them in reference to the aforesaid agreement for the construction of the said Barringer High Schhol, and that judgment be granted against said defendants in said amounts.

e) That plaintiffs have such other different and further relief, consistent with the causes of action herein, as may be good, proper and necessary to effectuate the relief sought herein.

LEO PFEFFER
ATTORNEY AT LAW
15 E. 84 STREET
NEW YORK 28, N. Y.
TRAFALGAR 9-4500

RECEIVED
AUG 13 1963
VLADECK & ELIAS

August 12, 1963.

Carl Rachlin, Esq.
280 Broadway
New York 7, N. Y.

In re: Essex County Building etc.
vs. Richardson et al.

Dear Carl:

I enclose a copy of the papers in this matter. I have no idea where the matter now stands, but I hope it will clear itself up very shortly.

Cordially yours,

Leo Pfeffer

Encl.

Derek Wynans

Contract Newark Brd. of Education & Arthur Venneri Co., contractor

Sect. 8 "... Contractor agrees that he & all persons acting in his behalf will comply with and the work to be done hereunder shall be subject to all the provisions of Sect 10:2-1 of revised Statutes of N.J. (which prohibit discrimination in hiring of workers, laborers, & mechanics for public works, prohibit discrimin. or intimidat. of employees hired for the performance of public works, & prescribe the penalties & forfeitures applicable in case of such discrimination of intimidat.) and the agreements listed in ~~Ots~~ RS 10:2-1 shall be deemed to be part

of this contract shall be
applicable to the work of
the contractor as though
they were included herein

Rev'd Stat 52:17A-4

Sd charged with carrying out
N J Civil Rts law (Pt 18
R.S. 18:25-1 et seq.

25-13 atty gen'l may file a complaint
25-25 atty gen'l shall be atty for
Civil Rts division

18:10-45 Kautinger parent
withhold sums for schools

~~Sandy Gallantor~~
~~60 Park~~
~~Newark~~

MSS
546

SEDFRE

ESSEX CO. WELFARE BD. et al. VS U.S. DEPT. of HEALTH, ED., and WELFARE NEW JERSEY 1968
(FEDERAL SUIT AGAINST AFDC FREEZE)

Box 36
Folder 23

State Historical Society Of Wisconsin

Please Retain Original Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

THE ESSEX COUNTY WELFARE BOARD,
a body corporate and politic of
the State of New Jersey, PHILIP
K. LAZARO, JOSEPHINE WOODS,
and EDNA GREENLEAF,

Petitioners

-v-

THE HONORABLE WILBUR J. COHEN,
SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND
WELFARE,

Respondent

COMPLAINT FOR INJUNCTION AGAINST IMPLEMENTATION AND ENFORCEMENT OF AN ACT OF CONGRESS ACTING BY AND THROUGH ITS DESIGNEES, THE SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

WILLIAM H. SHEIL
Attorney for Petitioners
Essex County Welfare Board
Hall of Records
Newark, New Jersey 07102

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

THE ESSEX COUNTY WELFARE BOARD,
a body corporate and politic of
the State of New Jersey, PHILIP
K. LAZARO, JOSEPHINE WOODS,
and EDNA GREENLEAF,

Petitioners

-v-

THE HONORABLE WILBUR J. COHEN,
SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND
WELFARE,

Respondent.

COMPLAINT FOR INJUNCTION AGAINST IMPLEMENTATION AND ENFORCEMENT OF AN ACT OF CONGRESS ACTING BY AND THROUGH ITS DESIGNEE, THE SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

I

JURISDICTION

1.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 2282. The Complaint seeks an injunction against enforcement of Section 208 (B) of amendments to Title IV of the Social Security Act, which upon being signed by the President on January 2, 1968, became Public Law 90-248 (81 Stat. 821) and by which the citizens of the County of Essex, its Welfare Board and countless numbers of needy children of the County of Essex and other citizens both indigent and otherwise are greatly aggrieved and their interests adversely affected.

2.

This is a class action brought by petitioners, on behalf of themselves and others similarly situated. The

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SEP 20 1968
Michael Keller, Jr., Clerk

controversy involves a deprivation of rights guaranteed by the "due process" clause of the Fifth Amendment to the United States Constitution and the "equal protection" standard enunciated by the Fourteenth Amendment to the United States Constitution and rendered applicable to the Federal Government and respondents by the Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

II

PETITIONERS

1.

(a) Petitioner, Essex County Welfare Board, a body corporate and politic is the agency established pursuant to the laws of the State of New Jersey to carry out all forms of categorical assistance programs, more specifically the plan of Aid to Dependent Children in the County of Essex.

(b) Petitioner, Philip K. Lazaro, Director, Essex County Welfare Board, appears in the suit as a citizen and taxpayer.

(c) Petitioner, Josephine Woods, is a resident of Newark, New Jersey and is the mother of four children. This petitioner receives assistance through the Essex County Welfare Board for herself and her children under the ADC Program based upon the continued absence from the home of a parent.

(d) Petitioner, Edna Greenleaf resides in the City of Newark, New Jersey and is the mother of four children. Petitioner receives assistance through the Essex County Welfare Board for herself and her children under the ADC Program based upon the continued absence from the home of a parent.

The petitioners seek this injunction against enforcement of Section 208 (B) of the amendments to Title IV of the Social Security Act, commonly known as the "ADC Freeze" on their own behalf and on behalf of and to assert the rights of large numbers of the indigent citizens of Essex County, similarly situated, primarily women and children, and other citizens whether prosperous or poor, whose interests are adversely affected and their well-being threatened by the Act of Congress in question.

III

RESPONDENT

1.

The Honorable Wilbur J. Cohen is Secretary of the United States Department of Health, Education and Welfare (hereinafter "HEW") and is vested by Federal law with implementing the Federal assistance programs, more particularly the plan called Assistance to Families with Dependent Children (hereinafter "AFDC"), and is vested by Federal law with the authority to approve the sufficiency of State Assistance Programs, in order to be eligible for Federal financial participation in the State categorical plans of welfare assistance.

IV

COUNT ONE

1.

The Essex County Welfare Board has its principal office in the City of Newark, New Jersey. The City of Newark lies in the geographical center of the Boston to Washington metropolitan corridor or "megalopolis", containing some 40 million people, or 20% of the nation's population. New Jersey is the most urbanized and most congested State in the nation, and, among the 21 counties in the State, Essex County, with 14% of New Jersey's population is the most populous county in the State.

2.

Since 1960, the Essex County Welfare Board has administered the categorical assistance plan of assistance for dependent children ("ADC") pursuant to an approved plan under Title IV, Part A of the Social Security Act (42 USC, Sec. 601, et seq.). The approval by the Federal Government of the State submitted plan is a prerequisite to Federal financial participation.

The administration of this assistance by the county welfare board is specified in the New Jersey statutes, N. J. S. A. 44: 10-2 as follows:

> "Needy dependent children living in New Jersey and the parent or parents or relative or relatives with whom they are living shall be entitled to financial assistance and other services from the county welfare board of the county in which they reside, * * *."

Under the New Jersey approved plan, the class of children generally eligible for this assistance through the county welfare board consists of "dependent children" which are defined in the New Jersey statutes, N. J. S. A. 44: 10-1 (c) as follows:

> "dependent child" means a child under the age of 18 or under the age of 21 and a student regularly attending school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment, who (1) has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent, * * *."

The statute then defines the relatives with whom the child may live, and the method by which need may be determined.

3.

In carrying out its statutory function of providing assistance, the Essex County Welfare Board has experienced a caseload growth in the Aid to Dependent Children Program of from 3300 cases in 1960 to 15,344 in 1968. Each case in this category represents an average of one adult and three children or 60,915 persons including 45,600 children. The Essex County Welfare Board has reached a net caseload growth of 203 new ADC cases per month and the percentage of increase has steadily grown each year. This is the largest net caseload growth of any county in the State.

4.

On December 15, 1967, the 90th Congress of the United States adopted certain amendments to Title IV of the Social Security Act, which upon being signed by the President on January 2, 1968 became Public Law 90-248 (81 Stat. 821). Section 208 (B) of this law provides as follows:

> "(b) Section 403 of such Act is further amended by adding at the end thereof the following new subsection:
>
> '(d) Notwithstanding any other provision of this Act, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such State under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such State under the age of 18 on that date.'"

The effective date of this act was changed to June 30, 1969 in the "Revenue and Control Act of 1968" (Pub. L. No. 90-364).

5.

The effect of the above quoted provision of the 1968 amendments to Title IV of the Social Security Act is to provide generally for federal financial participation for children in New Jersey and other states who are eligible for AFDC assistance by reason of deprivation of parental support due to death, continued absence from the home, or physical or mental incapacity of a parent, while at the same time excluding some children of this same general class of eligibles from federal financial participation solely on the basis of the time their applications for assistance are filed. This arbitrary legislative calendar cut-off in itself wholly irrational and capricious, makes a further unreasonable and punitive distinction against needy children by operating if and when they claim eligibility on the ground of continued absence from the home of a parent rather than upon death or incapacity of a parent.

6.

Section 208 (B) is on its face violative of the "due process" clause of the Fifth Amendment to the United States Constitution and of the "equal protection" standard enumerated by the Fourteenth Amendment and rendered applicable to the Federal Government and Respondents by the Fifth, Ninth and Tenth Amendments to the United States Constitution in that the attempted subclassification of said section does not rationally relate to any purpose for which Title IV of the Social Security Act was enacted; does not rest upon any reasonable basis or distinction between the children included and children excluded from Federal financial assistance; and creates a classification which is wholly and grossly arbitrary, irrational, unreasonable and capricious.

7.

In the fiscal year ending June 30, 1968, there was a total expenditure of public funds through the Essex County Welfare Board in the ADC Program from all levels of government, Federal, State and County of approximately 44 million dollars. For the single month of July, 1968 in the ADC Program in Essex County, there was a Federal contribution of $1,340,100.00. For this same month, the county contribution was $1,192,800.00 and the contribution by the State was the same.

The Federal contribution toward ADC assistance costs in Essex County has steadily declined from approximately 44 percent in 1960 to 36 percent in 1968. This has resulted in a corresponding increase in the proportionate county share to help make up the decreasing Federal contribution. Although the County of Essex carries the highest level of ADC assistance costs in the State, its equalized valuation per inhabitant is below the State average. Like most areas with a large inner-city population, about 75% of the county's revenue comes from unfavorable ratables and a high property tax rate. The operation of the "ADC Freeze" affects the citizens of this and other impacted urban population areas throughout the country and will result in a punitive Federal financial rejection of our stricken cities.

8.

The Essex County Welfare Board does not have the option of adopting an arbitrary and discriminatory denial of assistance as has been adopted by the Federal Government, but on the contrary, must provide assistance to all eligible individuals that apply or suffer the consequences of a complete loss of all

Federal financial participation, regardless of whether the applicants are in the group that qualify for Federal assistance or fall in the "ADC Freeze" group. Section 402 (a) (10) of the Social Security Act requires as a prerequisite to Federal approval, that a State "AFDC" plan must provide:

> " * * * that all individuals wishing to make application for Aid to Families with Dependent Children shall have an opportunity to do so, and that Aid to Families with Dependent Children shall be furnished with reasonable promptness to all eligible individuals."

The same Federal statutes deny a benefit to a certain class of citizens while mandating other levels of government to make this benefit available under the threat of withdrawal of all Federal funds.

9.

This freeze limits increases in Federal matching funds in relation to the increase in a standard segment of the population from year to year. Thus, if the number of persons for whom application is made exceeds the relative growth of this segment of the population, Federal subsidy is denied to those applicants in excess of this figure.

Population projections for the seven year period from 1968 to 1975 show an anticipated population increase for New Jersey of 2.4 percent per year. Caseload projections, on the other hand, based on current experience, show a caseload growth for Essex County of 15.7 per cent per year. Based upon the above, the operation of the freeze will deprive the needy children of Essex County of $300,000.00 in Federal benefits in the first year of operation and in excess of $300,000.00 for each year thereafter. More importantly, the essentials of minimum subsistence will be denied to countless children and other indigent persons in a manner wholly contrary to the basic Federal-local partnership in welfare assistance.

The denial of Federal contribution will compel local Government to resort to a further taxation of seriously overburdened sources in order to attempt to meet its mandatory function. Its ability to meet the crisis of human need will be seriously impaired and its level of efficiency will suffer through the withdrawal of Federal financial participation.

As a result of the national phenomenon of mass migration of the poor to urban centers, the plaintiff agency has absorbed a disproportionate share of what constitutes a Federal problem, and at the same time will receive a greater loss of Federal help for these same reasons. Plaintiffs and other welfare recipients may be discharged from receiving assistance due to gaining employment or attaining sufficient income through other sources. Should they and others similarly situated reapply at a later date, the provisions of the "ADC Freeze" will apply to them and they will suffer thereby. The Act of Congress in question has deprived, and will continue to deprive, unless restrained, plaintiffs and other similarly situated of their rights under the United States Constitution. The damage and injury done to plaintiffs by reason of their being deprived of the foregoing rights is continuing and irreparable, and there is no adequate remedy at law.

WHEREFORE, plaintiffs pray:

1. That this Court convene a statutory court of three judges pursuant to Title 28, United States Code, Section 2284, for the purpose of hearing and determining this cause.

2. That the Court declare Section 208 (B) of Public Law 90-248 (81 Stat. 821) to be unconstitutional and void under

the Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution in that:

(a) it arbitrarily and discriminatorily classifies certain needy and dependent children who are otherwise eligible for Federal AFDC assistance as ineligible, solely on the basis of the time their applications are filed, if and when they claim eligibility on the ground of continued absence from the home of a parent rather than upon death or incapacity of a parent, and

(b) is an attempted subclassification of that class of needy and dependent children generally eligible for AFDC assistance which does not rationally relate to any purpose for which Title IV of the Social Security Act was enacted, and does not rest upon any reasonable basis or distinction between the children included and children excluded from Federal financial assistance."

3. Issue a preliminary and a permanent injunction

(a) restraining and preventing respondent from implementing Section 208 (B) of Public Law 90-248 (81 Stat. 821) in their administration of Title IV of the Social Security Act."

(b) restraining and preventing respondent from requiring the various States to implement Section 208 (B) of Public Law 90-248 (81 Stat. 821) in their state-level administration of AFDC plans as a condition of continued Federal financial participation therein.

4. That the Court enter such other, further and alternative orders and relief as the Court may deem equitable and just.

William H. Sheil
WILLIAM H. SHEIL
Attorney for Petitioners

P.O. Address:
Essex County Welfare Board
Room 402
Hall of Records
Newark, New Jersey 07102
Telephone: (201) 621-6700

CERTIFICATE OF SERVICE

I, William H. Sheil, attorney for petitioners, do certify that I have this day served a copy of the within and foregoing Complaint, upon Respondents, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed to their counsel of record, to wit:

Joel Cohen, Esq., and
Mrs. Frances White
Office of the General Counsel
U. S. Department of Health, Education and Welfare
330 Independence Avenue, S.W.
Washington, D. C. 20201

and further certify that I have in like manner transmitted copies of the within and foregoing petition to:

Honorable Ramsey Clark
Attorney General of the United States
United States Department of Justice
Washington, D. C.

and

Honorable David M. Satz
United States Attorney
Federal Building
Newark, New Jersey

This 20th day of September, 1968

William H. Sheil

WILLIAM H. SHEIL
Attorney for Petitioners

SEDF Forizs
164 Madison Ave 10016

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

OFFICE OF THE ADMINISTRATOR

June 28, 1968

TO: STATE ADMINISTRATORS

I want to inform you immediately about the following three amendments to the Social Security Act contained in the Revenue and Expenditure Control Act of 1968 which was approved by the President today:

1. Limitation on number of children with respect to whom Federal payments may be made under program of aid to families with dependent children. The effective date of this provision in the present law is postponed from July 1, 1968 to July 1, 1969. In addition, certain other changes are made to adjust the effect of the limitation to certain judicial decisions.

2. Aid for families with dependent children in case of unemployed fathers receiving unemployment compensation. Assistance payments under the AFDC program with respect to an unemployed father are prohibited with respect to any week for which the father receives unemployment compensation. (Under the 1967 amendments, assistance payments were prohibited for any month for which the father received any unemployment compensation for any part of the month.)

3. Federal payments under medical assistance program for certain services includible under supplementary medical insurance program. The 1967 amendments prohibited, effective January 1, 1968, the payment of Federal matching funds under title XIX toward the cost of services which would have been covered under the supplementary medical insurance program if the individual had been enrolled under that program. Under the new law, the effective date has been postponed until January 1, 1970.

Attached are excerpts from the conference report (House Report No. 1533, 90th Congress, 2nd Session, dated June 10, 1968), giving the language for these amendments, as contained in the new law.

As soon as possible, we shall be sending you policy material for implementing these amendments.

Sincerely,

Mary Switzer

Mary E. Switzer
Administrator

Excerpt from
Revenue and Expenditure Control Act of 1968
Conference Report (to accompany H. R. 15414)
House Report No. 1533, 90th Congress 2nd Session
June 10, 1968

"Title III /of H. R. 15414/ - SOCIAL SECURITY ACT AMENDMENTS"

"Sec. 301. Limitation on Number of Children with Respect to Whom Federal Payments may be made under Program of Aid to Families with Dependent Children

"Subsection (d) of section 403 of the Social Security Act is amended (1) by inserting '(1)' immediately after '(d)', (2) by inserting '(except the succeeding paragraphs of this subsection)' immediately after 'Act', (3) by striking out 'June 30, 1968' and inserting in lieu thereof 'June 30, 1969', and (4) by adding at the end of such subsection the following new paragraphs:

"'(2) In the case of any State which is determined by the Secretary to have effectuated, in compliance with or in reliance upon or in consideration of a judicial decision (as defined in paragraph (3)), a policy of providing aid to families with dependent children under its State plan approved under this part to or on behalf of individuals who, except for such policy, would not be eligible for such aid, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section were made to the State for the calendar quarter beginning January 1, 1968, shall, for purposes of applying the provisions of paragraph (1), be increased by the average monthly number, in the calendar quarter beginning April 1, 1969, of children under the age of 18 who are deprived of parental support or care by reason of the continued absence from the home of a parent and who by reason of such policy began to receive such aid after March 1968 and received such aid during the calendar quarter beginning April 1, 1969.

"'(3) As used in paragraph (2), the term 'judicial decision' means any decision by a court of the United States of competent jurisdiction in any case or controversy in which there is decided the issue of the validity, under the United States Constitution, of any law, rule, regulation, or policy of a State under which aid to families with dependent children is denied to individuals otherwise eligible therefor because of failure to meet duration of residence requirements or because of the relationship between a male individual and the mother of the child or children with respect to whom such aid is sought."

OVER

"Sec. 302. Aid to Families with Dependent Children in Case of Unemployed Fathers Receiving Unemployment Compensation

"Section 407(b)(2)(C) of the Social Security Act is amended to read as follows:

"(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) —
"(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and
"(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States."

"Sec. 303. Federal Payments under Medical Assistance Program for Certain Services Includible under Supplementary Medical Insurance Program

"(a)(1) Section 1903(b)(2) of the Social Security Act is amended by striking out '1967' and inserting in lieu thereof '1969'.

"(2) Section 222(d) of the Social Security Amendments of 1967 is amended by striking out '1967' and inserting in lieu thereof '1969'.

"(b) The amendments made by subsection (a) shall be effective with respect to calendar quarters beginning after December 31, 1967." End (Pages 24-26 of House Report No. 1533)

SCHOLARSHIP,
EDUCATION AND
DEFENSE
FUND FOR
RACIAL EQUALITY inc.
164 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 532-8216

9/21/68

Dear Mr Shields

Enclosed is a proposed complaint as requested. Please let me know your thoughts

Sincerely

Carl Rachlin

Contributions are deductible for income tax purposes

▪ *president:* Andrew E. Norman ▪ *vice presidents:* William S. Ellis, Nannette Sachs ▪ *secretary:* Ezra Levin ▪ *treasurer:* Shelley Appleton ▪ *executive director:* Marvin Rich ▪ *leadership development director:* Ronnie M. Moore ▪ *legal director:* Carl Rachlin ▪ *BOARD OF DIRECTORS:* Nils R. Douglas, *chairman* ▪ James Baldwin ▪ Katrina McCormick Barnes ▪ Allan Barton ▪ Jonathan Bingham ▪ Canon James P. Breeden ▪ Robert Curvin ▪ Charlotte Devree ▪ Robert F. Drinan, S.J. ▪ Michael O. Finkelstein ▪ Doris Freedman ▪ James T. Harris, Jr. ▪ Claude Heckscher ▪ Norman Hill ▪ Arthur Kimmelfield ▪ Dr. Archie Lacey ▪ Jeremy Larner ▪ Joann List Levinson ▪ John Lewis ▪ Leon Modeste ▪ Henry Morgenthau, III ▪ Dr. William Stuart Nelson ▪ Edward Norton ▪ Richard J. Schwartz ▪ Elaine Slater ▪ Rowland Watts

490

ESSEX COUNTY WELFARE BOARD
HALL OF RECORDS, NEWARK, N. J. 07102

PHILIP K. LAZARO,
DIRECTOR
MILTON K. WEINSTEIN,
DEPUTY DIRECTOR
TELEPHONE 621-6700

IN REPLYING PLEASE MENTION OUR FILE
NO.

October 1, 1968

Carl Rachlin, Esquire
164 Madison Avenue
New York, New York 10016

RE: THE ESSEX COUNTY WELFARE BOARD, et als.
v.
THE HONORABLE WILBUR J. COHEN, SECRETARY,
UNITED STATES DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE

Dear Mr. Rachlin:

Thank you for your letter of September 21, 1968 containing draft of proposed Complaint. Unfortunately, I had to move in the United States District Court here in New Jersey prior to receiving your material, however, your suggestions should prove useful in subsequent pleadings, briefs, etc. to be filed by us during the course of the litigation.

I am enclosing a copy of our Complaint which was filed on September 20, 1968. We are awaiting respondent's answer and will be happy to keep you informed.

Very truly yours,

ESSEX COUNTY WELFARE BOARD

William H. Sheil

William H. Sheil,
Attorney for Petitioners

WHS:BMN
Enclosure (1)

6

ESSEX COUNTY WELFARE BOARD
HALL OF RECORDS, NEWARK, N. J. 07102

PHILIP K. LAZARO,
DIRECTOR
MILTON K. WEINSTEIN,
DEPUTY DIRECTOR
TELEPHONE 621-6700

IN REPLYING PLEASE MENTION OUR FILE
NO.________________

November 13, 1968

Carl Rachlin, Esquire
Scholarship, Education and Defense Fund
for Racial Equality
164 Madison Avenue
New York, New York 10016

RE: THE ESSEX COUNTY WELFARE BOARD, et als.
v.
THE HONORABLE WILBUR J. COHEN, SECRETARY,
UNITED STATES DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE
Civil #957-68

Dear Mr. Rachlin:

I thought you would be interested to know that Judge Hastie, Chief Judge of the Third Judicial Circuit of the United States Court of Appeals has ordered the convening of a three judge United States District Court.

The panel will be United States Circuit Court Judge Francis L. Van Deusen, United States District Court Judge Lawrence A. Whipple and United States District Court Judge James Coolahan.

The case has been set for oral argument during the week of December 9, 1968 at Newark, New Jersey at 10:00 A.M. The Court has ordered all briefs to be filed within ten days prior to the oral argument.

Very truly yours,

William H. Sheil

William H. Sheil,
Attorney for Petitioners

WHS:BMN

P.S. Just before this letter was sent out, we received a communication from Judge Coolahan setting this case down for December 20, 1968 at 10:00 A.M.

November 18, 1968

Mr. William H. Sheil
Attorney for Petitioners
Essex County Welfare Board
Hall of Records
Newark, N.J. 07102

The Essex County Welfare Board, et. als.
v
The Honorable Wilbur J. Cohen, Secty.,
United States Dept. of Health, Ed. &
Welfare. Civil #957-68

Dear Mr. Sheil:

Thank you for your letter of November 13, 1968 notifiying me that the argument will be held December 20th. I am not certain from the letter, if you wish anything from us or not. Please advise accordingly.

Thank you again.

Sincerely,

Carl Rachlin
Legal Director

CR/ef

I

JURISDICTION

1.

The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 2201 and Title 28, United States Code, Section 2202. Petitioner ____________ asserts that the remedies allowed under 28 USC 2201 and 28 USC 2202 are appropriate in this case on the grounds that the provisions of 90-248 Sec. 208 (b) as amended June 10, 1968 by Title III of H. R. 15414, Sec. 301 are unconstitutional. ____________ asserts that P. L. 90-248 Sec. 208 (b), as amended, is violative of the "due process" clause of the Fifth Amendment; and that his implementation of that provision, as would be required by his official duties, would force him to commit acts violative of the rights guaranteed to citizens by the "due process" and "equal protection" clauses of the Fourteenth Amendment. Not wishing to commit such unconstitutional acts, ____________ applies to this court for relief.

2.

____________, co-petitioners in their own behalf and on behalf of all others similarly situated pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure, assert that the above mentioned statute constitutes a deprivation of rights guaranteed them by the "due process" clause of the Fifth Amendment, and the "due process" and "equal protection" clauses of the Fourteenth Amendment.

3.

This is a proper case for determination by a three judge court pursuant to 28 USC Sec. 2281 since it seeks an injunction to restrain the Respondent from the enforcement, operation and execution of P.L. 90-248 Sec. 208 (b), as amended, on the grounds that said provision is unconstitutional.

II

PETITIONER

4.

Petitioners are:

1) ____________ County Director of the Essex County, Department of Social Services (hereinafter referred to as Director). It is, and has been since ________, ____, his official duty to administer various forms of public assistance and welfare benefits, including the Federal, State and County plan for Aid to Families with Dependent Children pursuant to 42 USC 601-609 (hereinafter referred to as AFDC). This plan is provided in joint co-operation by Federal, State and County agencies.

2) Petitioner ____________ (herein after referred to as

"recipient") residing at ____________ in Essex County, State of New Jersey, is a person receiving benefits under the AFDC plan. (S)he represents approximately _____ people similarly receiving benefits under AFDC.

III

RESPONDENTS

5.

The Honorable Wilbur J. Cohen is Secretary of the United States Department of Health, Education and Welfare (hereinafter referred to as "HEW") and authorized to administer the AFDC Program to the States pursuant to 42 USC 601-609.

IV

STATEMENT OF FACTS

6.

At the present time the AFDC plan is being administered in Essex County, New Jersey. There are approximately _____ persons receiving benefits in the State of New Jersey under this plan. _____ persons are 18 and under dependent children, as defined by statute. This number represents _/_ of the 18 and under population of the State. There are approximately _____ persons receiving benefits in Essex County, New Jersey, under the AFDC plan. _____ persons in this figure are 18 and under dependent children, as defined by statute. This number represents -/- of the 18 and under population of the county.

7.

For the fiscal year beginning __________ and ending ______ the cost of the state program was $_____. Of this amount ____%, $_____, was deferred by Federal funds; ____%, $____. by State funds and ____%, $______, by County funds. For the same period the cost of the County program was $____. Of this amount ____%, $____, was deferred by Federal funds; ____%, $____, by State funds; and ____%, $____, by County funds.

8.

On December 15, 1967 the 90th Congress of the United States adopted certain amendments to Title IV of the Social Security Act, which upon being signed by the President on January 2, 1968, became Public Law 90-248 (81 Stat 821) Section 208 (b) (hereinafter referred to as the "freeze"). This law provides as follows:

> (b) Section 403 of such act is further amended by adding at the end thereof the following new subsection:
>
> (d) Notwithstanding any other provision of this Act, the average monthly number of dependent children under the age of 18 who have been

> deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such state under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this Section were made to such State for the calendar quarter beginning January 1, 1968 bore to the total population of such state under the age of 18 on that date.

This provision was later amended to change the date at which it would become effective from July 1, 1968 to July 1, 1969.

9.

In the State of New Jersey the ratio of 18 and under recipients to the total ~~21~~ 18 and under population on January 1, 1968 was ____%. On July 1, 1969, the effective date of the "freeze", it is expected that the ratio of 18 and under children eligible for AFDC to the total 18 and under population will be ____%. This indicates that approximately _____ children who would have been previously eligible for AFDC will be ineligible if the "freeze" is allowed to stand.

10.

In the County of Essex, New Jersey the ratio of 18 and under recipients to the total 18 and under population on January 1, 1968 was _____%. On July 1, 1969, the effective date of the "freeze", it is expected that the ratio of 18 and under children eligible to AFDC to the total 18 and under population will be _____%. This indicates that approximately _____ children who would have been previously elibible for AFDC will be ineligible if the "freeze" is allowed to stand; or the amount of the average budget going to a family of four would have to be reduced by ____%, or $_____.

11.

If the "freeze" acts as a bar of Federal funds going to persons in excess of the above mentioned ratio, a family so barred from Federal funds would only receive $____ for their monthly budget. This figure represents the amount of the family budget presently deferred by State and County funds. It goes without saying that this amount is not sifficient to provide even the most basic life necessities.

12

The alternative to barring Federal funds under AFDC to those individuals who are in excess of the ratio of 18 and under dependent children on AFDC to those not on the AFDC plan on January 1, 1968 is to reduce across the board the monthly grant of all AFDC recipients. In the year 1969 this would result in a ____% cut in the monthly budget of an AFDC family of four which amounts to a reduction of $_____ in the monthly budget. This would leave an AFDC family of four only $______ for their monthly budget, a figure clearly insufficient to live in health and dignity.

13

As neither the County of Essex nor the State of New Jersey can appropriate sufficient funds to make up the deficit in available funds for eligible AFDC recipients caused by the "freeze" these persons will be arbitrarily, irrationally and capriciously denied a chance to live in health and dignity.

14

By administering the "freeze" the Respondent, as a representative of the government of the United States, and as an individual, will be denying the Petitioning recipients due process of law granted them under the Fifth Amendment of the Constitution of the United States by denying them property to which they have a statutory right under ~~guaranteed by~~ 42 U.S.C. 601-609.

15

The "freeze" if administered by the Respondent will either totally deny persons Federal money under AFDC even though they are in every other respect eligible, or else the monthly grants of all AFDC recipients will have to be reduced across the board to a level which would render it impossible for them to live in health and dignity.

16

Such an arbitrary, irrational and capricious denial of a minimum living standard is clearly contrary to the provisions of 42 USC 601-609 and is thereby a denial of property to which Petitioning recipients have a statutory right without due process as guaranteed by the Fifth Amendment.

17

Petitioning recipients further assert that if the "freeze" is given effect their rights to due process will be denied as guaranteed by the Fourteenth Amendment of the Constitution of the United States. As the AFDC plan is jointly administered by Federal, State and County agencies, property to which they have a statutory right will be denied by the State and County agencies in concert with Respondent. This denial of property to which they have a statutor right will be denied in a purely irrational, arbitrary, and capricious manner, violative of due process under the Fourteenth Amendment.

18

Finally Petitioning recipients assert that if Respondent administers the "freeze" their right to equal protection guaranteed by the Fourteenth Amendment will be violated. Those persons in excess of the ratio of 18 and under AFDC recipients to the non-recipient 18 and under population as of January 1, 1968 will be denied Federal funds under the AFDC plan though they are in every other respect eligible for such assistance.

19

Because Petitioning recipients will be unconstitutionally denied property without due process, and unconstitutionally denied equal protection by the implementation of the "freeze" by the Respondent -- the Petitioning recipients in their behalf and on behalf of all others similarly situated assert that they have a valid, timely and personal interest in this controversy, that their interests are immenently affected by the "freeze", that they will suffer irreparable damages by its implementation and that they therefore have proper standing to challenge the constitutionality of the Respondent's implementation of it.

20

Petitioner DIRECTOR asserts that he is entitled to a declaratory judgment on the following grounds: P. L. 90 - 248 Sec. 213 (b), the same which created the "freeze", and which amends Section 402 (a) of the Social Security Act, provides that

> by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs

since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

21

Since the cost of living in Essec County has increased ____% since the last cost of living adjustment Essex County will have to raise the grants to AFDC recipients by that percentage. This mandate to raise AFDC budgets contradicts the "freeze", which will greatly reduce the Federal funds available under AFDC. *For paragraph 22, see attached sheet.

23

Petitioning Director asserts that the "freeze" is violative of the Fifth Amendment for the same reasons as mentioned in paragraphs 17 and 18.

24

Petitioning Director finally asserts that his personal interest in the controversy arises from the fact that the "freeze would require him in his official capacity to perform acts which are unconstitutional for the above mentioned reasons.

25

Not desiring to perform acts which are contrary to the United States Constitution and not wanting to be partially instrumental in causing permanent and irreparable injury to co-petitioners and countless thousands similarly situated -- Petitioner Director asserts he has a valid, timely, and personal interest in this controversy, and that because of his interest in this matter and the immenence of the "freeze" he has proper standing to challenge the constitutionality of the Respondent's implementation of it.

Wherefore Petitioning Director and Petitioning Recipients on behalf of themselves and all others similarly situated jointly and separately respectfully pray:

(1) That a three-judge Court be convened to determine the controversy pursuant to 28 USC Sec. 2281.

(2) That the Court enter a declaratory judgment pursuant to 28 USC Sec. 2201 clarifying the contradiction between the mandates of the "cost of living" clause, P.L. 90-248 Section 213 (b) and the "freeze", P.L 90-248 Section 208 (b).

(3) That this Court enter a declaratory judgment pursuant to 28 USC 2201 declaring that P.L. 90-248 Section 208 (b) of the "freeze" is void and of no effect insofar as it violates rights guaranteed citizens by the Fifth and Fourteenth Amendments of the Constitution of the United States for the above stated reasons.

(4) That the Court issue a permanent injunction pursuant to 28 USC 2202 restraining Respondent from giving force and effect to P.L 90-248 Section 208 (b) on

the grounds that it is unconstitutional for the above stated reasons.

(5) That pending the determination of the prayer for permanent injunction this Court issue a preliminary injunction restraining the Respondent from giving force and effect to P.L 90-248 Section 208 (b).

(6) That pending determination of the prayer for a preliminary injunction this Court issue, after notice to the Respondent, an order temporarily restraining him from giving force and effect to P.L. 90-248 Section 208 (b).

(7) That this Court enter such other, further, and alternative orders and relief as the Court may deem just and proper.

22.

Petitioning Director asserts that the "freeze" is violative of rights guaranteed under the "due process" and "equal protection" clauses of the Fourteenth Amendment for the same reasons as mentioned in paragraphs 17 and 18.

II. THE EQUAL PROTECTION ANALYSIS

A. Arbitrariness

1. THE FIFTH AMENDMENT PROHIBITS FEDERAL LEGISLATION DENYING EQUAL PROTECTION OF THE LAWS

The protection of the public from legislative classifications that are unreasonable, capricious, or illegitimate is one of the fundamental prerequisites for responsible government, on local,state, federal, or whatever level. The United States Constitution, Art. XIV, contains an equal protection clause to guarantee that principle in state government. Although there is no express equal protection clause applicable to the federal government, a functional equivalent has been found implicit in the Fifth Amendment guarantee that no person shall be deprived of life, liberty, or property without due process of law. In Bolling v. Sharpe, 347 U.S. 497(1954), the Supreme Court so held, reasoning:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.
>
> -347 U.S. at 499

In Bolling v. Sharpe the Court applied the Fifth Amendment to discard as arbitrary the racial classifications underlying the District Of Columbia segregated school system. Such invalidation of a groundless racial classification is a classic use of the equal protection concept, cf. Brown v. Board of Education, 347 U.S. 483(1954).

It is clear that Fifth Amendment equal protection prohibits not just racial classifications but all arbitrary classifications, as does the Fourteenth Amendment. In Schneider v. Rusk, 377U.S. 163(1964), the Supreme Court faced a section of the Immigration and Nationality Act of 1952 which provided that naturalized citizens might lose their citizenship by a three-year residence in their country of origin, whereas no such restriction applied to native-born citizens. The Court applied the equal protection concept to hold the section invalid, saying:

> This statute proceeds on the impermissable assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that it is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does frobid discrimination that is "so unjustifiable as to be violative of due process." Bolling v. Sharpe....
>
> 377 U.S. at 162

A last case specifically imposes a Fifth Amendment equal protection limitation on federal spending. In Simkins v. Cone Mem. Hospital , 323 F.2d 959(4th Cir, 1963), cert denied 376 U.S. 938(1964), Negro citizens challenged the constitutionality of a federal-state funding program for hospitals (the Hill-Burton program) which served segregated institutions. The federal act was itself tainted with a provision for funding separate but equal facilities, and both state and federal governments were so involved in the comprehensive programs for hospital regulation as to convert the exclusionary acts of private hospitals into public discrimination. The Fourth Circuit held the segregation provision of the federal statute together with implementing regulations and the actual practice of discrimination to be in violation of the Fifth Amendment due process clause, citing Bolling v. Sharpe; the state participation was also in violation of Fourteenth Amendment equal protection.

2. THE CLASSIFICATIONS OF SECTION 208(b) ARE ARBITRARY WITH REGARD TO THE PROGRAM'S PURPOSE, WHICH IS TO AID FAMILIES WITH DEPENDENT CHILDREN.

Although the standards for Fifth Amendment equal protection have not been extensively elaborated, they should be imported from the more developed case law under the Fouteenth Amendment, because the same principle of controlled governmental power underlies both constitutional articles. Thus like persons must be treated alike by the federal as well as the state government. "Arbitrary selection can never be justified by calling it classification." Gulf Colorado & S.F. Ry. v. Ellis, 165 U.S. 150, 159(1897). Rather, "[classification] ...must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Id. at 155. And see Morey v. Douds, 354 U.S. 457, 465-66(1953); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412,415(19).

Since "the courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose," McLaughlin v. Florida, 379 U.S. 184, 191(1964), we must consult 42 U.S.C. Sec. 601, which establishes a program of "Grants to States for Aid and Services to Needy Families with Children." Such program is:

> For the purpose of encouraging the care of dependent children in their own homes or in the

> homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in each State, to needy children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.... [emphasis added]

The Freeze placed on grants to states by Section 208(b) Of the 1967 Social Security Amendments is limited to these "dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent." This is by no means all of the class of families with dependent children who are aided by the AFDC program. The specified needy families, those with an absent parent, are not even a segregated category under present AFDC state programs; the states face a laborious examination of their rolls family by family to determine which ones fall into the specified group. Furthermore, it is clear that the singling out of this sub-group bears no relation to the purposes of the program cited above. Needy children are in no less need because a parent is absent from the home than if the parent were dead or disabled. Family life is not "maintained and strengthened" nor is a parent"s "capcbility for the maximum self-support and personal independence" increased by singling out these families in particular to be the basis for reduced funding.

Nor is there any reasonable grounds for funding aid to families who were on the rolls before January 1, 1968, but not funding grants to those have applied and will apply thereafter. A flat limitation on the number of families funded, based only

On an arbitrary census date, is a flagrant and invidious denial of equal protection, and is not mitigated by the provision for increase in proportion to population. An arbitrary number regularly increased is still arbitrary.

3. THE CLASSIFICATIONS OF SECTION 208(b) ARE ARBITRARY WITH REGARD TO ANY SUBSIDIARY PURPOSE WHICH MIGHT BE FOUND FOR THE FREEZE.

The proper reference for the justification of any classification made in a program such as AFDC is to the broad general purpose of the program as a whole. See, for example, McLaughlin v. Florida, 379U.S. 184(1964), where the Supreme Court looked at a whole chapter of the Florida code to find a general purpose (control of adultery) by which to judge the classification made in a component subsection prohibiting interracial cohabitation. Thus any distinctions so subversive of the general purpose of aiding dependent children as those of sec. 208(b) cannot be validated by reference to financial savings, merely instrumental goals, or irrelevant judgments of character.

But even if the harsh classification of sec. 208(b) was in aid of some purpose implicit in that section alone or in other sections of the act rather than in aid of the act as a whole, still no adequate justification can be shown for this particular distinction.

a. As a method of saving money

The Report of the House Ways and Means Committee on H.R. 12080, the 1967 Social Security Amendments, at 110, gave this explanation for the Freeze:

> Your committee believes that Federal financial participation in the AFDC program must be kept within reasonable bounds. In addition to the means described earlier which are designed to reduce the number of children on the AFDC rolls, the bill would impose a limit on

> Federal financial participation designed to freeze the present situation with respect to that category which is growing most rapidly.

And see generally the testimony of Committee Chairman Mills in presenting the bill before the House, Cong. Rec. for Aug. 17, 1967, at H 10668.

Surely the choice of absent-parent families as the target of federal cost-saving is as egregious an example as can be imagined of a capricious classification. Even though they may constitute the bulk of the AFDC case load, they cannot for that reason alone be denied aid given to others. The person thus discriminated against is in no logical relation to the purpose of cost-saving, except by the accident of his similarity to others in the same situation, It is as though aid were denied to black or Christion or multiple-child AFDC families in Georgia just because taken together such persons formed a majority of applicants and the state wanted to save money. The dominant statutory purpose of aiding needy children must prevail over an unequal discrimination imposed for a reason less central to the program. If the federal government wishes to reduce AFDC expenditures, it must do so across the board, as by reducing its proportional contribution to the states. See generally Harvith,"Federal Equal Protection and Welfare Assistance," 31 Albany L. Rev. 210, 230-31(1967). And compare *Collins v. State Board of Social Welfare* , 248 Iowa 369(1957), where a denial of per-child aid beyond a family maximum was considered unjustified by limited funds or otherwise, and invalidated under the state equal protection guarantee.

b. As an incentive to the states to adopt employment and work training programs for AFDC recipients.

Another purpose suggested for the Freeze is to encourage the states to adopt the "constructive" programs designed to reduce the number of dependent children-- the family employment and job-training programs, day care centers, foster home care, family planning services, and paternity and support suit efforts. House Report on H.R. 12080, 110. Consider the floor comments of Chairman Mills:

> Are you satisfied with the fact that illegitimacy in this country is rising and rising and rising? I am not. We have tried to encourage the States to develop programs to do something about it....Butwe are not going to continue to put Federal funds into States for the benefit of parents when they refuse to get out of that house and try to earn something.
>
> Cong. Rec., 17 Aug. 1967, at H 10668

As the AFDC rolls of the states increase, the theory goes, they shall have to adopt these programs for thinning the ranks of the dependent or suffer a cutoff of federal funds for the increased load.

Regardless of which of the "constructive" programs is sought to be encouraged, the sec.208(b) classification is too narrow to pass the test of rationality, and is defective in its timing provision as well. If as Chairman Mills said, "We sincerely mean for the States to reduce these rolls as fast as they can train these people to work," then Congress chose a clumsy club for the purpose. Even though the absent-parent group is a large one, it does not contain all those AFDC parents who might benefit from the work training and employment services, or other programs. There is no apparent reason for singling out and denying funds to the absent-parent group for its greater need its greater need or benefit from the new services, relative to other AFDC families. Families where both parents are present and unemployed, for example, should be in greater need of training programs. And even if the Freeze provokes the desired state response, adoption of the "constructive" programs, there is no necessary relation between the rate at which such programs would reduce the AFDC rolls and the rate of their increase through additional eligible applicants. The additional applicants might be penalized regardless of the results of the "constructive" programs. And the new services, even with rapid implementation, could have only minor effects on the rate of increase in AFDC rolls until at least the end of this year, whereas the Freeze is based on the size of the affected group in last January. Statement of Sen. Edward Brooke, Hearings on H.R. 12080 Before the Senate Finance Comm., 90th Cong., 1st Sess. pt. 2, 827-28.

With regard to the compulsory employment programs in particular, sec.208(b) as an incentive is overinclusive as well as underinclusive, as argued above. The employment programs will not apply to children under 16 or to those over 16 who are attending school. Thus a large proportion of those who suffer a denial of funds under the Freeze will be unaffected by the new self-support emphasis which the Freeze is supposed to encourage. Whether the states respond to the incentive or not, the risk is being borne by the innocent.

c. As an incentive for the states to adopt programs to reduce illegitimacy.

If the goal is reduction of illegitimacy, the Freeze deprivations are of equally glaring irrationality. The state birth control and family planning services provided under the

1967 Amendments are to be voluntary, "to be accepted or rejected in accordance with the dictates of the individual's conscience or religion," House Report on H.R. 12080, 98. Thus the Freeze could not consistently be in support of such programs, because it is inherently coercive.

The Freeze is fatally underbroad for the purpose of encouraging a reduction in illegitimacy because it impinges only on absent-parent families, who are for this purpose absolutely indistinguishable from, say, those families with one parent dead. Nor does the Freeze include two-parent families with illegitimate children, or those that might have them. As in Gulf, Colorado & S.F. Ry. v. Ellis, 165 U.S. 150, 159(1897),

> Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained.

On the other hand the Freeze is overbroad for the purpose of discouraging illegitimacy because only a small portion of the children of absent-parent families are illegitimate. Neither parent nor child is given the opportunity to complain that her morality or his paternity has been maligned by the arbitrary classification. Some of the mothers included could very well be happily married and faithful; the sweeping language of the Freeze would include, for example, those poor families where the husband was in the Army or other service of his country.

Even if some of these in the absent-family category are illegitimate children, no defensible theory can be advanced for reducing grants on the basis of that misfortune. The illegitimate child is not responsible for his birth, and is usually in greater need than most of the family stability and security which it is the purpose of AFDC to provide. The withholding of a public benefit on a theory of discouraging illegitimacy is constitutionally questionable in face of the probable decisions in the cases of Levy v. Louisiana and Glona v. American Guar. & Liab. Ins. Co., both now before the Supreme Court. A withholding based on such flimsy evidence of individual desserts as exists for that of sec.208(b) is contrary to all the fundamental principles of fairness in American criminal, civil, and constitutional law.

d. As an incentive for the states to bring more paternity and support suits.

A last "constructive" program whose state adoption the Freeze has been said to support is the initiation of support and paternity suits against absent fathers and responsible relatives. Congressman Byrnes of the House Ways and Means Committee argued on the floor that:

> In my opinion the evidence which was presented before the Committee on Ways and Means was perfectly clear to the effect that there has not been any effort to find these parents in far too many cases, to find these fathers in far too many cases, who have abandoned the support of their children.
>
> In other words, Mr. Chairman, we have got to put some teeth into this situation in order to force the States to see that these fathers bear the burden of supporting their own children-- that is the only area in which we have placed any limitation upon this part of the legislation.
>
> Cong. Rec., 17 Aug. 1967 at H 10675

Use of a freeze on funds to absent-parent families as a device to reach remote responsibility-shirking fathers is as cruel as it is irrational. The family would not be needy, would not be on AFDC, if it could get whatever support was due it from family

members

members, To penalize the victims for breach of the legal duty of someone beyond their control is as senseless as killing the geese to punish the fox. Such a sacrifice of innocents would be a clear violation of Fifth Amendment due process and equal protection.

Thus none of these possible purposes for the Sec. 208(b) Freeze have been rationally implemented by the classification imposed therein. The new "constructive" programs could have been required of the states under the 1967 amendments, and would have produced only minor state grumbling; instead it appears that they have been forced on the states deviously and with serious disruption of state welfare administration, producing severe strains in federal-state relations and inevitable injustice to the supposed beneficiaries of the AFDC program.. By the most basic standards of equal protection the Freeze must be declared unconstitutionally arbitrary.

B. THE AFDC FREEZE IS "BOUND TO DISCOURAGE" FAIR AND EQUITABLE TREATMENT BY THE STATES OF ALL PERSONS ELIGIBLE FOR AFDC PAYMENTS.

Section 208 of the 1967 Amendments to the Social Security Act establishes the AFDC Freeze by denying to a state federal matching funds for AFDC payments to dependent children, with a parent absent from the home for reasons other than death, whose number exceeds the number of the recipients permitted by the amendment. By thus limiting federal matching funds, the Freeze encourages states to make wholly arbitrary discriminations among those eligible for AFDC payments, such as Georgia's waiting list system, in order to avoid the expenditure of additional state funds where federal matching funds are not provided.

An analogous situation was before the Supreme Court in Robinson v. Florida, 378 U.S. 153 (1964). After refusing to leave a restaurant, a group of Negroes and whites were arrested and convicted under a Florida statute making it a misdemeanor for a customer in a restaurant to refuse to leave the restaurant after being requested to do so by the management. At the time of this arrest, a State Health Board regulation which was adopted under state legislative authority required segregated rest rooms in restaurants, and a state-issued manual on the Florida regulations contained the same requirement. The Court said that while the regulations did not expressly forbid the serving of whites and Negroes together, "they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together." (emphasis added) Id. at 156. Consequently, the Court ~~unanimously~~

held that because of the regulations, the action of the proprietor, who was unconcerned about segregated washrooms, in telling the sit-inners to leave was so infected with "state action" as to violate the Equal Protection Clause of the Fourteenth Amendment.

As Georgia's action in adopting the waiting list system demonstrates, the AFDC Freeze is at least as bound to discourage fair and equitable treatment by the states of all persons eligible for AFDC benefits as the regulation requiring segregated restrooms was bound to discourage integration of restaurants. And whereas in Robinson, the record before the Supreme Court did not show whether the state requirement of separate lavatories had ~~been shown on the record to have~~ discouraged integration by any identifiable restaurateurs, this Court has before it indisputable proof of the effect of the AFDC Freeze.

Reasoning similar to that in Robinson was employed in Peterson v. City of Greenville, 373 U.S. 244 (1963), in which a store manager refused to serve Negroes at the store's lunch counter. When the Negroes refused to leave the lunch counter, they were arrested and convicted of violating a state trespass statute. Although the city argued that the manager would have acted as he did independently of the city ordinance which required segregation in restaurants, the Court said that the manager's motivation was irrelevant and that the state through the ordinance of its agent, the City of Greenville, was involved to a significant extent in the discriminatory action of the store manager. The convictions of the sit-inners were reversed as being in violation of the Fourteenth Amendment.[1]

See also Hall v. St Helena Parish School Board, 197 F. Supp. 649 (E.D.La., 1961), aff'd per curiam, 368 U.S. 515 (1962) where a three-judge court struck down a Louisiana school closing-tuition grant system because it was designed to encourage the continuation of a segregated system of public education. The Louisiana law declared unconstitutional made no mention of race on its face but simply allowed a majority of the voters in a parish to close the public schools. But the court found that the tuition grants given by the states to enable children (black and white) to go to "private schools" (segregated in almost every case and often in the same buildings formerly used by the public school system) and other forms of state involvement made the Louisiana plan an attempt to subvert the holding of Brown v. Board of Education, 349 U.S. 294 (1955). In short, the state statutory and administrative scheme made inevitable the perpetuation of the unconstitutional segregating of public school children by race. In accord, Poindexter v. Louisiana Financial Assistance Commission, 12 Race Relations Law Reporter 1387(E.D. La., 1967) where the "private" schools were often less than 50% state supported.

Another case supporting the reasoning in Robinson is Simkins v. Moses H. Cone Memorial Hospital, supra. In that case the Court said that in order to give effective relief, it was necessary to pass upon the validity of the statute and regulation which affirmatively sanctioned the racial discrimination in the defendant hospitals. The federal provisions were held unconstitutional under the Due Process Clause of the Fifth Amendment because they authorized segregation by state-connected institutions.

While the AFDC Freeze does not explicitly authorize arbitrary and unreasonable treatment of children with parents absent from the home, by limiting the number of such children who may receive state AFDC benefits supplemented by federal matching funds, it certainly suggests that this treatment should be employed. The Georgia waiting list program resulted from this suggestion. Hence just as it was necessary in Simkins to invalidate the statute which authorized racial discrimination in order to effect adequate relief, it is necessary in the instant case to invalidate the AFDC Freeze which calls for arbitrary discrimination among AFDC recipients.

NOTE: The emphasis on the "affirmative sanction" and "authorization" of segregation by the federal statute and regulation may undercut the argument in the section immediately preceding this one that the Court in Simkins did not need to reach the federal provisions in order to decide the case before it.

A similar problem may arise with the argument in the preceding section that the Supreme Court in Robinson could have relied on Shelley v. Kraemer instead of the health regulation in order to find state action. This argument may make the "bound to discourage" language look more strained and artificial than it would standing alone.

A slightly different line of reasoning was followed by Mr. Justice White in his opinion in Evans v. Newton, 382 U.S. 296 (1966), which involved a park devised to the City of Macon, Georgia, for white use only and a change in the trustees of the park from the city's Board of Managers to private individuals. In order to find state involvement in the racial designation of the will which created the park, Mr. Justice White looked to two Georgia statutes which permitted racial discrimination in charitable trusts dedicated to public use. Although acknowledging that the state did not directly coerce the testator's racial discrimination, Mr. Justice White determined that these statutes, adopted just six years before the will was executed, removed doubt as to the validity of the racial restrictions on the charitable trust. He also determined that Georgia law prohibited all private discrimination in connection with charitable trusts, except racial discrimination. Hence he concluded that the trust was "incurably tainted" by the discriminatory state legislation which validated such a condition and that:

> ~~As a result~~, '[T]he State through its regulations has become involved to such a significant extent' in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction 'must be held to reflect. . .state policy and therefore to violate the Fourteenth Amendment.' Id. at

Just as the discriminatory state statute was held by Mr. Justice White in Evans v. Newton to taint the will and to bring about the discriminatory provision in it, so in the instant case the discrimination of the Freeze against dependent children with a parent absent from the home for reasons other than death will taint any state program adopted to implement it.

ADDENDUM

Peterson held that the convictions had the effect of enforcing the racially discriminatory ordinance, and thus state action was involved. But the Supreme Court stated clearly that the store manager's action was state action:

> When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice. It has thus effectively determined that a person owning, managing or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons. The Kress management, in deciding to exclude Negroes, did precisely what the city law required.

THE UNCONSTITUTIONALITY OF THE AFDC FREEZE

I. THE FREEZE PROVISION OF THE 1967 SOCIAL SECURITY ACT AMENDMENTS VIOLATES THE CONSTITUTIONAL PROVISIONS PLACED ON THE EXERCISE OF FEDERAL SPENDING POWER.

Congress, in limiting the federal matching funds for needy children who are receiving welfare because of the absence of a parent for reasons other than death, was purporting to use the spending power granted it in Article I, Section 8 of the United States Constitution ("The Congress shall have Power To lay and collect Taxes...to pay the Debts and provide for the common Defence and general Welfare...."). But the spending power, as with all the powers of the federal government, is not an unlimited grant but restricted in its use by judicial interpretation and by the gloss of the Tenth Amendment to the Constitution.[1] Congress in instituting the AFDC freeze, exceeded those constitutionally imposed conditions on the exercise of the spending power that have been delineated by the Supreme Court. See Helvering v. Davis, 301 U.S. 619 (1937), upholding the constitutionality of the old age pension provisions of the Social Security Act against the allegation that the program violated the Tenth Amendment. The Court held that the federal expenditures in the public welfare field must be for a legitimate public purpose and must advance the general welfare, as opposed to the welfare of a particular group. An expenditure thus must not be "clearly wrong, a display of arbitrary power, not an exercise of judgment." Id. at 640. Courts will generally presume that Congress has observed these conditions on its power. See Carmichael v. Southern Coal and Coke Co., 301 U.S. 495 (1937), upholding the

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[1] "The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively or to the People."

The Supreme Court in United States v. Darby, 312 U.S. 100(1941), said that the Tenth Amendment was only a truism, declaratory of a relationship existing between national and state governments at the time of the Amendment's adoption. The Court, however, supported the idea that the Tenth Amendment means at least that Congress can exercise only delegated powers to achieve constitutionally permitted ends.

Alabama legislature's exercise of its spending power against Fourteenth Amendment due process arguments. But this presumption takes effect against arguments of illegitimate public purpose and arbitrary exercise of power only when Congress makes some display of the rational basis for its decision. In *Carmichael* the Supreme Court found that the Alabama legislature in establishing an unemployment compensation program had as a basis for the exercise of its power the need shown by the suffering of the jobless in the Depression and [illegible] studies evidencing a loss of purchasing power; a rise in vagrancy, criminality, and illegitimacy; a deterioration of family life and a drop in the marriage and birth rates; a general impairment of health; and a rising incidence of malnutrition in children because of unemployment. *Id*. at 515-518. In *Helvering* the Court observed:

> Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory groups. Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance. A great mass of evidence was brought together supporting the policy which finds expression in the act.
> *Id*. at 642.

No evidence was brought together to support the policies which find expression in the AFDC freeze --that the federal government should put financial pressure on the states to reduce their welfare rolls in the AFDC category, that the federal government should not continue to finance the rapidly increasing numbers of "undeserving poor" seeking public assistance. No evidence was presented in favor of the means used by Congress to implement these policies --the freeze itself. There is no recorded testimony or evidence of fact-finding by the House Ways and Means Committee. Witnesses who appeared before the Senate Finance Committee uniformly denounced the freeze and pointed to its likely unfortunate consequences. No presidential commission found a need for the legislation --indeed the Secretary of Health, Education, and Welfare testified to the contrary.

Hearings on H.R. 12080 before the Senate Finance Committee, 90th Cong., 1st Ses., Part I at 217. The total arbitrariness of the AFDC freeze is demonstrated by that provision of the Social Security Act which still finds in need of assistance precisely those children who are denied federal funds by the freeze, those absent a parent for reasons other than death. 42 U.S.C.A., Section 606(a). There is some evidence that Congress simply struck out blindly, acting on popular myths that depict the parents of AFDC children to be lazy, shiftless, promiscuous people, and in its blindness chose to encourage punishment of the children for the unverified transgressions of the adults. (Witness, for example, Senator Long's "brood mares" remark).

Congress therefore did improvise a judgment when it passed the AFDC freeze. The freeze is "clearly wrong, a display of arbitrary power, not an exercise of judgment" and is thus an unconstitutional use of the spending power for other than a legitimate public purpose.

The National Welfare Rights Organization and the recipients it represents have standing to challenge this unconstitutional exercise of power since they will in every liklihood suffer from the implementation of the freeze. They need not, however, show irreparable injury at the time they bring their legal challenge. See Helvering v. Davis, supra, where the plaintiff who had standing to challenge the unconstitutionality of the contested portions of the Social Security Act was a shareholder of a corporation who claimed that if his corporation followed the Act and deducted the required amount from the employees' paychecks the workers would demand wage increases. These demands would most likely result in labor unrest and, eventually, higher wages -- all of which would cause his share of stock to lose value. Welfare recipients can show at least this much harm to their interests since the state involved in this litigation, Georgia, has announced that the freeze will cause it either to implement its "waiting

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B. The Nature of the Harm in the Freeze

1. THE LEGISLATIVE CLASSIFICATION IN THE FREEZE IS SO ARBITRARY AS TO TAINT THE STATUTE ON ITS FACE.

Regardless of its direct effect on the states or the AFDC recipients, the Freeze is in violation of the Fifth Amendment because of the inherent arbitrariness on its face. As has been shown, there is no legitimate and rational justification for the reduction of grants only for the category of needy families with one parent absent from the home. The defect would perhaps be more glaring if the statute read, "Henceforth AFDC grant funding shall increase only in proportion to increases in the white [or Christian or red-headed] population of the state." In those cases a court would not hesitate to strike down such a capricious action of the soveereign, regardless of its effect. But the present ststute must fall just as surely as would those suggested, for it is no less patently arbitrary in light of its purposes.

A close reading of the most relevant precedent, Simkins v. Moses H. Cone Mem. Hospital, 323 F.2d 959(4th Cir.1963), cert. denied 376 U.S. 938(1964), supports the theory that a federal funding statute such as the Freeze can be incurably tainted on its face. In Simkins a proviso of the federal Hill-Burton (hospital construction) Act allowed grants to states for separate but equal hospital facilities. North Carolina received such grants for its state-wide hospital construction plan, and pursuant to regulation by both the state and the federal administering agency, operated a racially segregated program. Rejecting the separate-but-equal approach under the classic doctrine of Brown v. Board of Education, the Fourth Circuit found state action in the regulation of the program and applied the Fourteenth Amendment equal protection standard to prohibit the racial discrimination by the state and hospital. HEW has done the equivalent in the recent Georgia conformity hearing decision, by finding Georgia's waiting list proposal to violate its "equitable treatment" doctrine. In the instant case as in Simkins the state can not be allowed such arbitrary behavior, regardless of reliance on the discriminatory classification in a federal statute. Thus the direct harm contemplated by both federal statutes might be cut off before it reaches the victims, the segregated Negroes or the absent-parent AFDC families. Whatever other method the state adopted to implement the inherently unreasonable classification would be subject to the same attacks and same prohibitions. The federal administering agency for hospital funds could have applied new regulations to assure state adherence to the Fourteenth Amendment, as HEW has proposed to do here. The court need go no further to protect those discriminated against from direct harm.

In Simkins, however, the Fourth Circuit was constitutionally compelled to go beyond the state discrimination and apply the Fifth Amendment equal protection concept to invalidate the federal segregation statute itself. Even if the separate-but-equal proviso never again saw the light of day, if it just quietly decayed in an unused corner of the Act, such an inherently arbitrary classification could not be permitted to exist in a federal statute. This is the most plausible explantion for the action of the Simkins court in reaching and deciding the federal question as well as the state question. It was a perfectly proper course and must be followed in our case as well.

An analogous case is Robinson v. Florida, 378 U.S. 153 (1964). A group of Negroes and whites attempting a sit-in were arrested and convicted under a Florida statute which made it a misdemeanor for a restaurant customer to refuse to leave the restaurant after being requested to do so by the management. At the time of the arrest a State Health Board regulation adopted under state legislative authority required segregated rest rooms in restaurants, and a state-issued manual on the Florida regulations contained the same requirment. Although neither the sit-in participants nor the restaurant proprietor had been concerned with the restrooms, but only with whether or not the participants would be served, the Supreme Court seized upon the regulations as part of a background of state discouragement of mixed restaurant services. With this state action involved, the proprieter's request to leave became violative of the Fourteenth Amendment and the convictions were reversed.

The Supreme Court did not have to consider the influence of the health board regulations on the restaurant manager in order to find state action in Robinson. It could have instead applied the doctrine of Shelley v. Kramer, 334 U.S. 1(1947); by convisting the sit-in participants, the Florida court was enforcing a racially discriminatory private action, and this involvement was enough to conststute stste action. In fact, the appellants emphasized this argument in their briefs. The Court decision, however, reached beyond the particular incident before it to strike at the basic authorization for the inequity manifested.

The earlier similar cases of Peterson v. City of Greenville, 373 U.S. 244(1963) and Lombard v. Louisiana, 373 U.S. 267(1963) share the approach of Robinson. In neitjer share the approach of *Robinson*. In neither case did the Court rely on the narrow groundof *Shelley v. Kramer*, to find state action in convictions of sit-in participants for failure to leave when requested; instead the Court said that the convictions enforced a racially discriminatory city ordinance in *Peterson* and racially discriminatory announcements of city policy by the mayor and police superintendant of New Orleans in *Lombard*. In both instances the Court went beyond relief from the immediate source of harm to strike at the public symbol, the discriminatory authorization, which indirectly did the damage. by originating the arbitrary selection of persons.

A statute may well be tainted by its language even when the classifications made are not racial. In the words of Chief Justice Warren,

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. [emphasis added].
>
> *Hernandez v. Texas*, 347 U.S. 475, 478(1954)

The Freeze is just such a case of prejudice. Relying on myths and half truths, the Congress has placed the stigma of public dissapproval on poor families in broken homes by using their class as the basis for an unjustified deprivation. The taint is in the federal statute, and it is there that it must be extinguished.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

ASSISTANCE PAYMENTS
ADMINISTRATION

15:D
August 8, 1968

Handbook Transmittal No. 145

TO STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

From : Stephen P. Simonds, Commissioner

Subject: Text of Titles IV and XIX of the Social Security Act, as Amended by Public Law 90-364 - Handbook I-1000

MATERIAL TRANSMITTED	MATERIAL SUPERSEDED
I-1100	I-1100, dated 4/24/68
I-1200, pages IV-16 and 23 and XIX-24 and 26	I-1200, pages IV-16 and 23, dated 2/8/68 and XIX-24 and 26, dated 3/19/68
Form, Record of Receipt of Handbook Transmittals	

BACKGROUND AND EXPLANATION

This transmittal contains the text of titles IV and XIX, as amended by the Revenue and Expenditure Control Act of 1968, P.L. 90-364, approved June 28, 1968.

EFFECTIVE DATES

As shown in text.

INSTRUCTIONS FOR HANDBOOK MAINTENANCE

1. In Part I-1000, remove the page on sections 1000 and 1100, dated 4/24/68, and substitute the enclosed page. In Part I-1200: (a) remove pages IV-15, IV-16, IV-23, and IV-24, dated 2/8/68, and substitute the enclosed pages; and (b) remove pages XIX-23, XIX-24, XIX-25, and XIX-26, dated 3/19/68 and substitute the enclosed pages.

2. Insert the enclosed Form, Record of Receipt of Handbook Transmittals immediately in front of the Form, transmitted by H.T. No. 74.

   Make appropriate notation on the new form.

1000. Federal Legislation

This chapter contains a compilation of the public assistance titles of the Social Security Act and other pertinent Federal legislation affecting the administration of the public assistance titles. This material has been complied solely for convenient reference purposes. For detailed information relating to amendments, see "Compilation of the Social Security Laws, "Government Printing Office, Washington, D. C. 20402. (Edition currently available covers period to 1/2/68.)

1100. Social Security Act

The Social Security Act was originally enacted August 14, 1935, and has been amended by various acts of Congress.

The preamble to the Social Security Act, as originally enacted, reads as follows:

AN ACT to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes.

Public Law 90-248, Social Security Amendments of 1967, approved January 2, 1968, made many significant changes to the Social Security Act and especially to title IV.

Materials, dated 2/8/68, 3/19/68, and 4/24/68, show the additions, changes, and deletions made by P.L. 90-248. Amendments for which no effective dates are indicated are effective on enactment, January 2, 1968. 1/

The material, dated 8/8/68 shows the additions, changes, and deletions, made by P.L. 90-364, the Revenue and Expenditure Control Act of 1968. Amendments for which no effective dates are indicated are effective on enactment, June 28, 1968. 1/

1/ Material, added or amended by these laws, is so designated ("New") or is identified by underscoring. Material that is or will become obsolete is shown in /brackets/.

(b) The method of computing and paying such amounts shall be as follows:

(1) The Secretary of Health, Education, and Welfare shall, prior to the beginning of each quarter, estimate the amount to be paid to the State for such quarter under the provisions of subsection (a), such estimate to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsection and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, (B) records showing the number of dependent children in the State, and (C) such other investigation as the Secretary may find necessary.

(2) The Secretary of Health, Education, and Welfare shall then certify to the Secretary of the Treasury the amount so estimated by the Secretary of Health, Education, and Welfare, (A) reduced or increased, as the case may be, by any sum by which the Secretary of Health, Education, and Welfare finds that his estimate for any prior quarter was greater or less than the amount which should have been paid to the State for such quarter, and (B) reduced by a sum equivalent to the pro rata share to which the United States is equitably entitled, as determined by the Secretary of Health, Education, and Welfare, of the net amount recovered during any prior quarter by the State or any political subdivision thereof with respect to aid to families with dependent children furnished under the State plan; except that such increases or reductions shall not be made to the extent that such sums have been applied to make the amount certified for any prior quarter greater or less than the amount estimated by the Secretary of Health, Education, and Welfare for such prior quarter.

(3) The Secretary of the Treasury shall thereupon, through the Fiscal Service of the Treasury Department and prior to audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Secretary of Health, Education, and Welfare, the amount so certified.

(c) [Repealed] 32/

32/ See footnote 7, page IV-4.

Sec. 403(d)

(d) (1) Notwithstanding any other provision of this Act the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any calendar quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such State under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such State under the age of 18 on that date.

(except the succeeding paragraphs of this subsection),

1969

NEW

(2) In the case of any State which is determined by the Secretary to have effectuated, in compliance with or in reliance upon or in consideration of a judicial decision (as defined in paragraph (3)), a policy of providing aid to families with dependent children under its State plan approved under this part to or on behalf of individuals who, except for such policy, would not be eligible for such aid, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section were made to the State for the calendar quarter beginning January 1, 1968, shall, for purposes of applying the provisions of paragraph (1), be increased by the average monthly number, in the calendar quarter beginning April 1, 1969, of children under the age of 18 who are deprived of parental support or care by reason of the continued absence from the home of a parent and who by reason of such policy began to receive such aid after March 1968 and received such aid during the calendar quarter beginning April 1, 1969.

(3) As used in paragraph (2), the term "judicial decision" means any decision by a court of the United States of competent jurisdiction in any case or controversy in which there is decided the issue of the validity, under the United States Constitution, of any law, rule, regulation, or policy of a State under which aid to families with dependent children is denied to individuals otherwise eligible therefor because of failure to meet duration of residence requirements or because of the relationship between a male individual and the mother of the child or children with respect to whom such aid is sought.

Operation of State Plans

Sec. 404. (a) In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary of Health, Education, and Welfare, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

(1) that the plan has been so changed as to impose any residence requirement prohibited by section 402(b), or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or

(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 402 (a) to be included in the plan;

Sec. 407(b)(1) (Continued)

(C)(i) such father has 6 or more quarters of work (as defined in subsection (d)(1)) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3)) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) will be referred to the Secretary of Labor as provided in section 402(a)(19) within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a)—

(i) if, and for so long as, such child's father [-- i] is not currently registered with the public employment offices in the State, [or] and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a), (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1), or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2)), under the program therein specified, to refer such father to the Secretary of Labor pursuant to section 402(a)(19).

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50 (or which is a 'quarter of coverage' as defined in section 213(a)(2)), or in which such individual participated in a community work and training program under section 409 or any other work and training program subject to the limitations in section 409, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

Sec. 408

Federal Payments for Foster Home Care of Dependent Children

Sec. 408. Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 406(a), also include a child (1) who would meet the requirements of such section 406(a) or of section 407 except for his removal after April 30, 1961, from the home of a relative (specified in such section 406(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 402, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 402, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 406(a) within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor. 35/

(b) the term "aid to families with dependent children" shall, notwithstanding section 406(b), include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

35/ Applies only with respect to foster care provided after December 1967.

1200. Public Assistance Titles (continued)

Medical Assistance Programs - Sec. 1902(a) (continued)

Notwithstanding paragraph (5), if on January 1, 1965, and on the date on which a State submits its plan for approval under this title, the State agency which administered or supervised the administration of the plan of such State approved under title X (or title XVI, insofar as it relates to the blind) was different from the State agency which administered or supervised the administration of the State plan approved under title I (or title XVI, insofar as it relates to the aged), the State agency which administered or supervised the administration of such plan approved under title X (or title XVI, insofar as it relates to the blind) may be designated to administer or supervise the administration of the portion of the State plan for medical assistance which relates to blind individuals and a different State agency may be established or designated to administer or supervise the administration of the rest of the State plan for medical assistance; and in such case the part of the plan which each such agency administers, or the administration of which each such agency supervises, shall be regarded as a separate plan for purposes of this title (except for purposes of paragraph (10)).

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes, as a condition of eligibility for medical assistance under the plan--

(1) an age requirement of more than 65 years; or

(2) effective July 1, 1967, any age requirement which excludes any individual who has not attained the age of 21 and is or would, except for the provisions of section 406(a)(2), be a dependent child under part A of title IV; or

(3) any residence requirement which excludes any individual who resides in the State; or

1200. Public Assistance Titles (continued)

Medical Assistance Programs - Sec. 1902(b) (continued)

(4) any citizenship requirement which excludes any citizen of the United States.

(c) Notwithstanding subsection (b), the Secretary shall not approve any State plan for medical assistance if he determines that the approval and operation of the plan will result in a reduction in aid or assistance (other than so much of the aid or assistance as is provided for under the plan of the State approved under this title) provided for eligible individuals under a plan of such State approved under title I, X, XIV, or XVI, or part A of title IV.

Payment to States

Sec. 1903. (a) From the sums appropriated therefor, the Secretary (except as otherwise provided in this section and section 1117) shall pay to each State which has a plan approved under this title, for each quarter, beginning with the quarter commencing January 1, 1966--

(1) an amount equal to the Federal medical assistance percentage (as defined in section 1905(b)) of the total amount expended during such quarter as medical assistance under the State plan (including expenditures for premiums under part B of title XVIII, for individuals who are recipients of money payments under a State plan approved under title I, X, XIV, or XVI, or part A of title IV, [and other insurance premiums] and, except in the case of individuals sixty-five years of age or older who are not enrolled under part B of title XVIII, other insurance premiums for medical or any other type of remedial care or the cost thereof); 15/ plus

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15/ Amendments effective for calendar quarters beginning after December 31, 1969. These amendments were made by the Social Security Amendments of 1967 and were to be effective December 31, 1967 but the effective date was changed to December 31, 1969, by P.L.90-364, Sec.303(a)(2).

1200. Public Assistance Titles (continued)

Medical Assistance Programs - Sec. 1903(a) (continued)

(2) an amount equal to 75 per centum of so much of the sums expended during such quarter (as found necessary by the Secretary for the proper and efficient administration of the State plan) as are attributable to compensation or training of skilled professional medical personnel, and staff directly supporting such personnel, of the State agency or any other public agency; 16/ plus

(3) an amount equal to 50 per centum of the remainder of the amounts expended during such quarter as found necessary by the Secretary for the proper and efficient administration of the State plan.

(b) (1) Notwithstanding the preceding provisions of this section, the amount determined under such provisions for any State for any quarter which is attributable to expenditures with respect to individuals 65 years of age or older who are patients in institutions for mental diseases shall be paid only to the extent that the State makes a showing satisfactory to the Secretary that total expenditures from Federal, State, and local sources for mental health services (including payments to or in behalf of individuals with mental health problems) under State and local public health and public welfare programs for such quarter exceed the average of the total expenditures from such sources for such services under such programs for each quarter of the fiscal year ending June 30, 1965. For purposes of this subsection, expenditures for such services for each quarter in the fiscal year ending

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16/ Effective for expenditures made after December 31, 1967.

1200. Public Assistance Titles (continued)

Medical Assistance Programs - Sec. 1903(b)(1) (continued)

June 30, 1965, in the case of any State shall be determined on the basis of the latest data, satisfactory to the Secretary, available to him at the time of the first determination by him under this subsection for such State; and expenditures for such services for any quarter beginning after December 31, 1965, in the case of any State shall be determined on the basis of the latest data, satisfactory to the Secretary, available to him at the time of the determination under this subsection for such State for such quarter; and determinations so made shall be conclusive for purposes of this subsection.

(2) Notwithstanding the preceding provisions of this section, the amount determined under subsection (a)(1) for any State for any quarter beginning after December 31, [1967] 1969, a/ shall not take into account any amounts expended as medical assistance with respect to individuals aged 65 or over which would not have been so expended if the individuals involved had been enrolled in the insurance program established by part B of title XVIII.

(c) (1) If the Secretary finds, on the basis of satisfactory information furnished by a State, that the Federal medical assistance percentage for such State applicable to any quarter in the period beginning January 1, 1966, and ending with the close of June 30, 1969, is less than 105 per centum of the Federal share of medical expenditures by the State during the fiscal year ending June 30, 1965 (as determined under paragraph (2)), then 105 per centum of such Federal share shall be the Federal medical assistance percentage (instead of the percentage

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16a/ This amendment shall be effective with respect to calendar quarters beginning after December 31, 1967. (Sec. 303(b) of P.L. 90-364)

Record of Receipt of Handbook Transmittals

8/8/68

This form should be filed in front of the Handbook. When a Handbook Transmittal is received:

1. **Make the changes specified in the transmittal.**
2. **Post on this form the number and date of transmittal, and your initials.**

(Check number against previous number. Missing transmittals should be requested from the associate regional commissioner, APA.)

Transmittal		Entered By	Transmittal		Entered By	Transmittal		Entered By	Transmittal		Entered By
No.	Date		No.	Date		No.	Date		No.	Date	

Calendar No. 995

90TH CONGRESS
2D SESSION

H. R. 15414

[Report No. 1014]

IN THE SENATE OF THE UNITED STATES

MARCH 1, 1968

Read twice and referred to the Committee on Finance

MARCH 15, 1968

Reported by Mr. LONG of Louisiana, with amendments

[Omit the part struck through and insert the part printed in italic]

AN ACT

To continue the existing excise tax rates on communication services and on automobiles, and to apply more generally the provisions relating to payments of estimated tax by corporations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, ETC.

(a) SHORT TITLE.—This Act may be cited as the "Tax Adjustment Act of 1968".

(b) AMENDMENT OF EXISTING LAW.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference

II

shall be considered to be made to a section or other provision of the Internal Revenue Code of 1954.

SEC. 2. CONTINUATION OF EXCISE TAXES ON COMMUNICATION SERVICES AND ON AUTOMOBILES.

(a) Passenger Automobiles.—

(1) In general.—Subparagraph (A) of section 4061 (a) (2) (relating to tax on passenger automobiles, etc.) is amended to read as follows:

“(A) Articles enumerated in subparagraph (B) are taxable at whichever of the following rates is applicable:

“If the article is sold—	The tax rate is—
Before January 1, 1970	7 percent
During 1970	5 percent
During 1971	3 percent
During 1972	1 percent.

The tax imposed by this subsection shall not apply with respect to articles enumerated in subparagraph (B) which are sold by the manufacturer, producer, or importer after December 31, 1972.”

(2) Conforming amendment.—Section 6412 (a) (1) (relating to floor stocks refunds on passenger automobiles, etc.) is amended by striking out “April 1, 1968, or January 1, 1969,” and inserting in lieu thereof “January 1, 1970, January 1, 1971, January 1, 1972, or January 1, 1973,”.

(b) Communications Services.—

(1) Continuation of tax.—Paragraph (2) of section 4251 (a) (relating to tax on certain communications services) is amended to read as follows:

“(2) The rate of tax referred to in paragraph (1) is as follows:

“Amounts paid pursuant to bills first rendered—	Percent—
Before January 1, 1970	10
During 1970	5
During 1971	3
During 1972	1.”

(2) Conforming amendments.—Subsection (b) of section 4251 (relating to termination of tax) is amended by striking out “January 1, 1969” and inserting in lieu thereof “January 1, 1973”, and subsection (c) of section 4251 is amended to read as follows:

“(c) Special Rule.—For purposes of subsections (a) and (b), in the case of communications services rendered before November 1 of a calendar year for which a bill has not been rendered before the close of such year, a bill shall be treated as having been first rendered on December 31 of such year.”

(3) Repeal of subchapter B of chapter 33.—Effective with respect to amounts paid pursuant to bills first rendered on or after January 1, 1973, subchapter B of chapter 33 (relating to the tax on communications)

ing to insurance companies), shall make payments of estimated tax (as defined in subsection (c)) during its taxable year as provided in subsection (b) if its ~~income tax imposed by section 11 or 1201 (a), or such subchapter L, for such taxable year, reduced by the credits against tax provided by part IV of subchapter A of chapter 1, can reasonably be expected to exceed $40~~ *estimated tax for such taxable year can reasonably be expected to be $40 or more.*

"(b) PAYMENT IN INSTALLMENTS.—Any corporation required under subsection (a) to make payments of estimated tax (as defined in subsection (c)) shall make such payments in installments as follows:

"If the requirements of subsection (a) are first met—	The following percentages of the estimated tax shall be paid on the 15th day of the—			
	4th month	6th month	9th month	12th month
Before the 1st day of the 4th month of the taxable year	25	25	25	25
After the last day of the 3d month and before the 1st day of the 6th month of the taxable year		33⅓	33⅓	33⅓
After the last day of the 5th month and before the 1st day of the 9th month of the taxable year			50	50
After the last day of the 8th month and before the 1st day of the 12th month of the taxable year				100

"(c) ESTIMATED TAX DEFINED.—

"(1) IN GENERAL.—For purposes of this title, in the case of a corporation the term 'estimated tax' means the excess of—

"(A) the amount which the corporation estimates as the amount of the income tax imposed by section 11 or 1201 (a), or subchapter L of chapter 1, whichever is applicable, over

"(B) the sum of—

is repealed. For purposes of the preceding sentence, in the case of communications services rendered before November 1, 1972, for which a bill has not been rendered before January 1, 1973, a bill shall be treated as having been first rendered on December 31, 1972. Effective January 1, 1973, the table of subchapters for chapter 33 is amended by striking out the item relating to such subchapter B.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect March 31, 1968.

SEC. 3. PAYMENT OF ESTIMATED TAX BY CORPORATIONS.

(a) REPEAL OF REQUIREMENT OF DECLARATION.—Section 6016 (relating to declarations of estimated income tax by corporations) and section 6074 (relating to time for filing declarations of estimated income tax by corporations) are repealed.

(b) INSTALLMENT PAYMENTS OF ESTIMATED INCOME TAX BY CORPORATIONS.—Section 6154 (relating to installment payments of estimated income tax by corporations) is amended to read as follows:

"SEC. 6154. INSTALLMENT PAYMENTS OF ESTIMATED INCOME TAX BY CORPORATIONS.

"(a) CORPORATIONS REQUIRED TO PAY ESTIMATED INCOME TAX.—Every corporation subject to taxation under section 11 or 1201 (a), or subchapter L of chapter 1 (relat-

"(A) the lesser of (i) $100,000, or (ii) the excess determined under paragraph (1) without regard to clauses (ii) and (iii) of paragraph (1)(B), reduced by

"(B) the amount determined under clause (ii) of paragraph (1)(B).

"(3) EXCLUSION PERCENTAGE.—For purposes of paragraph (2) and section 6655(e), the term 'exclusion percentage' means—

"In the case of a taxable year beginning in—	The exclusion percentage is—
1968	80 percent
1969	60 percent
1970	40 percent
1971	20 percent.

"(d) RECOMPUTATION OF ESTIMATED TAX.—If, after paying any installment of estimated tax, the taxpayer makes a new estimate, the amount of each remaining installment (if any) shall be the amount which would have been payable if the new estimate had been made when the first estimate for the taxable year was made, increased or decreased (as the case may be), by the amount computed by dividing—

"(1) the difference between—

"(A) the amount of estimated tax required to be paid before the date on which the new estimate is made, and

"(B) the amount of estimated tax which would "(i) the amount which the corporation estimates as the sum of the credits against tax provided by part IV of subchapter A of chapter 1, ~~and~~

"(ii) the amount equal to 22 percent of the amount which the corporation estimates as its surtax exemption (as defined in section 11(d)) for the taxable year, and

"~~(ii)~~ *(iii)* in the case of a taxable year beginning after December 31, 1967, and before January 1, 1972, the amount of the corporation's transitional exemption for such year.

~~"(2) TRANSITIONAL EXEMPTION.—For purposes of clause (ii) of paragraph (1)(B), the amount of a corporation's transitional exemption for a taxable year equals the exclusion percentage (determined under paragraph (3)) multiplied by the lesser of—~~

~~"(A) $100,000, or~~

~~"(B) the excess determined under paragraph (1) without regard to such clause (ii).~~

"(2) TRANSITIONAL EXEMPTION.—For purposes of clause (iii) of paragraph (1)(B), the amount of a corporation's transitional exemption for a taxable year equals the exclusion percentage (determined under paragraph (3)) multiplied by—

(2) DEFINITION OF TAX.—Subsection (e) of section 6655 (relating to definition of tax) is amended to read as follows:

“(e) DEFINITION OF TAX.—

“(1) IN GENERAL.—For purposes of subsections (b) and (d), the term ‘tax’ means the excess of—

“(A) the tax imposed by section 11 or 1201 (a), or subchapter L of chapter 1, whichever is applicable, over

“(B) the sum of—

“(i) the credits against tax provided by part IV of subchapter A of chapter 1, ~~and~~

“(ii) the amount equal to 22 percent of the corporation’s surtax exemption (as defined in section 11(d)) for the taxable year, and

“~~(ii)~~ *(iii)* in the case of a taxable year beginning after December 31, 1967, and before January 1, 1972, the amount of the corporation’s transitional exemption for such year.

~~“(2) TRANSITIONAL EXEMPTION.—For purposes of clause (ii) of paragraph (1)(B), the amount of a corporation’s transitional exemption for a taxable year equals the exclusion percentage (determined under section 6154(c)(3)) multiplied by the lesser of—~~

have been required to be paid before such date if the new estimate had been made when the first estimate was made, by

"(2) the number of installments remaining to be paid on or after the date on which the new estimate is made.

"(e) APPLICATION TO SHORT TAXABLE YEAR.—The application of this section to taxable years of less than 12 months shall be in accordance with regulations prescribed by the Secretary or his delegate.

"(f) INSTALLMENTS PAID IN ADVANCE.—At the election of the corporation, any installment of the estimated tax may be paid before the date prescribed for its payment.

"(g) CERTAIN FOREIGN CORPORATIONS.—For purposes of this section and section 6655, in the case of a foreign corporation subject to taxation under section 11 or 1201 (a), or under subchapter L of chapter 1, the tax imposed by section 881 shall be treated as a tax imposed by section 11."

(c) FAILURE BY CORPORATION TO PAY ESTIMATED TAX.—

(1) RAISING 70 PERCENT REQUIREMENT TO 80 PERCENT.—Subsections (b) and (d) (3) of section 6655 (relating to underpayments of estimated tax) are amended by striking out "70 percent" each place it appears therein and inserting in lieu thereof "80 percent".

"SEC. 6425. ADJUSTMENT OF OVERPAYMENT OF ESTIMATED INCOME TAX BY CORPORATION.

"(a) APPLICATION FOR ADJUSTMENT.—

"(1) TIME FOR FILING.—A corporation may, after the close of the taxable year and on or before the 15th day of the third month thereafter, and before the day on which it files a return for such taxable year, file an application for an adjustment of an overpayment by it of estimated income tax for such taxable year. An application under this subsection shall not constitute a claim for credit or refund.

"(2) FORM OF APPLICATION, ETC.—An application under this subsection shall be verified in the manner prescribed by section 6065 in the case of a return of the taxpayer, and shall be filed in the manner and form required by regulations prescribed by the Secretary or his delegate. The application shall set forth—

"(A) the estimated income tax paid by the corporation during the taxable year,

"(B) the amount which, at the time of filing the application, the corporation estimates as its income tax liability for the taxable year,

"(C) the amount of the adjustment, and

"(D) such other information for purposes of

~~"(A) $100,000, or~~

~~"(B) the excess determined under paragraph (1) without regard to such clause (ii).~~

"(2) TRANSITIONAL EXEMPTION.—For purposes of clause (iii) of paragraph (1)(B), the amount of a corporation's transitional exemption for a taxable year equals the exclusion percentage (determined under section 6154(c)(3)) multiplied by—

"(A) the lesser of (i) $100,000, or (ii) the the excess determined under paragraph (1) without regard to classes (ii) and (iii) of paragraph (1)(B), reduced by

"(B) the amount determined under clause (ii) of paragraph (1)(B).

"(3) SPECIAL RULE FOR SUBSECTION (d) (1) AND (2).—In applying this subsection for purposes of subsection (d) (1) and (2), the exclusion percentage shall be the percentage applicable to the taxable year for which the underpayment is being determined."

(d) ADJUSTMENT OF OVERPAYMENT.—

(1) ALLOWANCE OF ADJUSTMENT.—Subchapter B of chapter 65 (relating to rules of special application) is amended by adding at the end thereof the following new section:

mated by the corporation on its application as its income tax liability for the taxable year, and (B) ~~$200~~ *$500.*

"(4) EFFECT OF ADJUSTMENT.—For purposes of this title (other than section 6655), any adjustment under this section shall be treated as a reduction, in the estimated income tax paid, made on the day the credit is allowed or the refund is paid.

"(c) DEFINITIONS.—For purposes of this section and section 6655(g) (relating to excessive adjustment)—

"(1) The term 'income tax liability' means the excess of—

"(A) the tax imposed by section 11 or 1201 (a), or subchapter L of chapter 1, whichever is applicable, over

"(B) the credits against tax provided by part IV of subchapter A of chapter 1.

"(2) The amount of an adjustment under this section is equal to the excess of—

"(A) the estimated income tax paid by the corporation during the taxable year, over

"(B) the amount which, at the time of filing the application, the corporation estimates as its income tax liability for the taxable year.

"(d) CONSOLIDATED RETURNS.—If the corporation carrying out the provisions of this section as may be required by such regulations.

"(b) Allowance of Adjustment.—

"(1) Limited examination of application.—Within a period of 45 days from the date on which an application for an adjustment is filed under subsection (a), the Secretary or his delegate shall make, to the extent he deems practicable in such period, a limited examination of the application to discover omissions and errors therein, and shall determine the amount of the adjustment upon the basis of the application and the examination; except that the Secretary or his delegate may disallow, without further action, any application which he finds contains material omissions or errors which he deems cannot be corrected within such 45 days.

"(2) Adjustment credited or refunded.—The Secretary or his delegate, within the 45-day period referred to in paragraph (1), may credit the amount of the adjustment against any liability in respect of an internal revenue tax on the part of the corporation and shall refund the remainder to the corporation.

"(3) Limitation.—No application under this section shall be allowed unless the amount of the adjustment equals or exceeds (A) ~~5~~ *10* percent of the amount esti-

"(B) the estimated income tax paid during the taxable year, reduced by the amount of the adjustment."

(e) CONFORMING AMENDMENTS.—

(1) Section 6655 (d) (1) is amended by striking out "reduced by $100,000".

~~(2) Section 243 (b) (3) (C) (v) is amended by striking out "$100,000 exemption" and inserting in lieu thereof "$100,000 amount under section 6154 (c) (2) (A) and section 6655 (c) (2) (A)".~~

(2) Section 243(b)(3)(C)(v) is amended to read as follows:

"(v) surtax exemption, and one $100,000 amount under section 6154(c)(2)(A) and section 6655(e)(2)(A), for purposes of estimated tax payment requirements under section 6154 and the addition to the tax under section 6655 for failure to pay estimated tax."

(3) Section 6020 (b) (1) is amended by striking out "section 6015 or 6016)" and inserting in lieu thereof "section 6015)".

(4) Section 6651 (c) is amended by striking out "section 6015 or section 6016" and inserting in lieu thereof "section 6015".

(5) Section 7203 is amended by striking out "sec-

seeking an adjustment under this section paid its estimated income tax on a consolidated basis or expects to make a consolidated return for the taxable year, this section shall apply only to such extent and subject to such conditions, limitations, and exceptions as the Secretary or his delegate may by regulations prescribe."

(2) Amendment of section 6655.—Section 6655 is amended by adding at the end thereof the following new subsection:

"(g) Excessive Adjustment Under Section 6425.—

"(1) Addition to tax.—If the amount of an adjustment under section 6425 made before the 15th day of the third month following the close of the taxable year is excessive, there shall be added to the tax under chapter 1 for the taxable year an amount determined at the rate of 6 percent per annum upon the excessive amount from the date on which the credit is allowed or the refund is paid to such 15th day.

"(2) Excessive amount.—For purposes of paragraph (1), the excessive amount is equal to the amount of the adjustment or (if smaller) the amount by which—

"(A) the income tax liability (as defined in section 6425 (c)) for the taxable year as shown on the return for the taxable year, exceeds "(e) MAILING OF DEPOSITS.—

"(1) DATE OF DEPOSIT.—If any deposit required to be made (pursuant to regulations prescribed by the Secretary or his delegate under section 6302 (c)) on or before a prescribed date is, after such date, delivered by the United States mail to the bank or trust company authorized to receive such deposit, such deposit shall be deemed received by such bank or trust company on the date the deposit was mailed.

"(2) MAILING REQUIREMENTS.—Paragraph (1) shall apply only if the person required to make the deposit establishes that—

"(A) the date of mailing falls on or before the second day before the prescribed date for making the deposit (including any extension of time granted for making such deposit), and

"(B) the deposit was, on or before such second day, mailed in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the bank or trust company authorized to receive such deposit.

In applying subsection (c) for purposes of this subsection, the term 'payment' includes 'deposit', and the tion 6015 or section 6016)," and inserting in lieu thereof "section 6015),".

(6) Section 7701(a) (34) (B) is amended by striking out "section 6016(b)" and inserting in lieu thereof "section 6154(c)".

(7) The table of sections for subpart B of part II of subchapter A of chapter 61 is amended by striking out the item relating to section 6016.

(8) The table of sections for part V of subchapter A of chapter 61 is amended by striking out the item relating to section 6074.

(9) The table of sections for subchapter B of chapter 65 is amended by adding at the end thereof the following:

"Sec. 6425. Adjustment of overpayment of estimated income tax by corporation."

(f) Effective Date.—The amendments made by this section shall apply with respect to taxable years beginning after December 31, 1967.

SEC. 4. TIMELY MAILING OF DEPOSITS.

(a) Timely Mailing Treated as Timely Deposit.—Section 7502 (relating to timely mailing treated as timely filing and paying) is amended by adding at the end thereof the following new subsection:

SEC. 6. AMENDMENTS TO TITLE IV OF THE SOCIAL SECURITY ACT.

(a)(1) Section 403(a) of the Social Security Act is amended by striking out "(subject to subsection (d))" in the matter preceding paragraph (1) thereof.

(2) Section 403(d) of such Act is repealed.

(b)(1) Section 407(b)(1)(A) of the Social Security Act is amended by adding "and" at the end thereof.

(2) Section 407(b)(1)(B) of such Act is amended by striking out ", and" at the end thereof and inserting in lieu thereof "; and ".

(3) Section 407(b)(1)(C) of such Act is repealed.

(c) Section 407(b)(2)(C) of the Social Security Act is amended by striking out "such child's father" and all that follows and inserting in lieu thereof "such child's father is not currently registered with the public employment office in the State."

(d)(1) Subsection (c) of section 407 of the Social Security Act is amended to read as follows:

"(c) Notwithstanding any other provisions of this section—

"(1) a State plan may, at the option of the State,

reference to the postmark date refers to the date of mailing."

(b) Effective Date.—The amendment made by subsection (a) shall apply only as to mailing occurring after the date of the enactment of this Act.

SEC. 5. INTEREST ON INDUSTRIAL DEVELOPMENT BONDS.

(a) Exclusion From Gross Income.—Until otherwise provided by law hereafter enacted, interest on obligations which are so-called industrial development bonds shall be excluded from gross income under section 103 of the Internal Revenue Code of 1954 in accordance with—

(1) the regulations prescribed under such section by the Secretary of the Treasury or his delegate, as in effect on March 13, 1968, and

(2) the principles set forth in Revenue Ruling 54-106 (CB 1954-1, 28), Revenue Ruling 57-187 (CB 1957-1, 65), and Revenue Ruling 63-20 (CB 1963-1, 24).

(b) Rulings.—The Secretary of the Treasury or his delegate is authorized and directed to issue ruling letters with respect to so-called industrial development bonds in conformity with the provisions of subsection (a).

SEC. 7. AMENDMENT TO TITLE XIX OF THE SOCIAL SECURITY ACT.

(a)(1) Section 1903(b)(2) of the Social Security Act is amended by striking out "1967" and inserting in lieu thereof "1969".

(2) Section 222(d) of the Social Security Amendments of 1967 is amended by striking out "1967" and inserting in lieu thereof "1969".

(b) The amendments made by subsection (a) shall be effective with respect to calendar quarters beginning after December 31, 1967.

Amend the title so as to read: "An Act to continue the existing excise tax rates on communication services and on automobiles, and to apply more generally the provisions relating to payments of estimated tax by corporations, and for other purposes."

Passed the House of Representatives February 29, 1968.

Attest: W. PAT JENNINGS,
Clerk.

provide for denial of all (or any part) of the aid under the plan with respect to a dependent child as defined in subsection (a) to which any child or relative might otherwise be entitled for any month if the father of such child received unemployment compensation under an unemployment compensation law of a State or of the United States for any week any part of which is included in such month, and

"(2) expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a), (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1), or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2)), under the program therein specified, to refer such father to the Secretary of Labor pursuant to section 402(a)(19)".

(2) Subsection (d) of section 407 of such Act is repealed.

(3) Section 203(b) of the Social Security Amendments of 1967 is repealed.

Calendar No. 995

90TH CONGRESS
2D SESSION

H. R. 15414

[Report No. 1014]

AN ACT

To continue the existing excise tax rates on communication services and on automobiles, and to apply more generally the provisions relating to payments of estimated tax by corporations.

MARCH 1, 1968

Read twice and referred to the Committee on Finance

MARCH 15, 1968

Reported with amendments

90th Congress } COMMITTEE PRINT
2d Session

SUMMARY OF THE DECISIONS OF THE CONFEREES ON H.R. 15414

REVENUE AND EXPENDITURE CONTROL ACT OF 1968

JOINT PUBLICATION
COMMITTEE ON FINANCE
OF THE
U.S. SENATE
AND
COMMITTEE ON WAYS AND MEANS
OF THE
U.S. HOUSE OF REPRESENTATIVES

MAY 9, 1968

Prepared for the use of the Senate Committee on Finance and the House Committee on Ways and Means

U.S. GOVERNMENT PRINTING OFFICE
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GENERAL STATEMENT

WASHINGTON, D.C., May 9.—The Honorable Wilbur D. Mills (D., Ark.), Chairman of the Committee on Ways and Means of the House of Representatives, and the Honorable Russell B. Long (D., La.), Chairman of the Committee on Finance of the Senate, today announced that the House and Senate conferees on H.R. 15414 had reached agreement on the Senate amendments to the bill.

H.R. 15414 as passed by the House of Representatives on February 29, 1968, extended excise taxes on automobiles and telephones and required more current income tax payments by corporations. The Senate amendments provided, among other things, for a 10-percent surtax and a $6 billion reduction in the ceiling on Government spending for fiscal year 1969. The bill passed the Senate on April 2, 1968.

The actions taken by the conference committee are generally described in the following paragraphs.

Sec. 1.—Title

The name of the Act is to be the Revenue and Expenditure Control Act of 1968.

Sec. 2.—Government Employee Limitation

It was agreed that with respect to permanent full-time civilian employees in the executive branch one vacancy in four in each department or agency is not to be filled until such time as the overall number of employees reaches the level of June 30, 1966. In the case of temporary and part-time employees, the number of such employees in any department or agency in any month is not to exceed the number in the corresponding month of 1967. A special rule is provided for agencies with 50 or fewer employees and the Director of the Bureau of the Budget is authorized to reallocate the positions to be filled among departments or agencies in the interest of the more efficient operation of the Government. Exempt from this provision are persons appointed by the President with the advice and consent of the Senate, casual employees, employees serving without compensation and employees (up to 70,000) who are provided summer employment as economically or educationally disadvantaged persons between the ages of 16 and 22.

Sec. 3.—Expenditure Limitation for Fiscal Year 1969

Expenditures for the fiscal year 1969 are to be reduced by $6 billion from the level of $186.1 billion estimated in the budget to $180.1 billion except that the following categories of expenditures, to the extent they exceed the amount shown in the budget, are not to be taken into account for purposes of applying this limitation:

(1) Expenditures for special support of Vietnam operations;
(2) Interest on the debt;
(3) Veterans benefit payments; and
(4) Payments from trust funds established by the Social Security Act, as amended.

Under this provision Congress would cut appropriations for current expenditures to the extent it could, but to the extent the Congressional reductions fell short of $6 billion, then the President would be required to further reduce actual spending to reach the limit.

Sec. 4.—Reduction in Obligational Authority

New obligational and loan authority for the fiscal year 1969 is to be reduced by $10 billion from the level of $201.7 billion proposed in the budget to $191.7 billion except that increases above the budget proposals for new obligational authority and loan authority for the same four purposes specified in section 3 are not to be taken into account. In addition, the President is to make a report to Congress next January, at the time the budget is submitted, including specific recommendations for legislation to rescind $8 billion of the $222.3 billion of unobligated balances of obligational and loan authority which was approved in years before the fiscal year 1969. The President is granted the authority in carrying out these expenditure and obligational authority provisions to reduce expenditures or obligations in those instances in which the amount to be expended or obligated is based upon a formula involving the amount appropriated.

Sec. 5.—Technical

This is a technical amendment which is the same in both the House and Senate versions of the bill.

Sec. 6.—Excise Tax on Autos and Telephone Service

The 10 percent excise tax on communications and the 7 percent excise tax on automobiles are continued in the manner provided in both the House and the Senate versions of the bill.

Sec. 7.—Speedup of Corporate Tax Payments

The Senate would have applied the House provision with respect to the speedup of corporate tax payments only in the case of tax liability over $5,500 (generally the tax on the first $25,000 of income) as compared to $40 under the House bill. The collection of tax payments on liability over this amount would have been placed on a current basis, over a five-year transitional period. (No change was made in the provision in both the House and the Senate versions of the bill which increases from 70 percent to 80 percent the percentage of estimated tax which must be reported currently.)

The conferees agreed to place all income tax liability above $40 in the case of corporations on a current payment basis. However, two transitional rules are provided to accomplish this result. In the first five-year period (1968–1972 inclusive), tax liabilities above $5,500 are placed on a current basis In the next five-year transitional period 1973–1977 inclusive tax liability below $5,500 will be placed on a current basis.

The Senate limitations on so-called quickie refunds of overpayments of estimated tax were accepted by the conferees—that is, quickie refunds will be available only where the overpayment exceeds the corporation's expected tax by at least 10 percent and by an amount equaling at least $500.

Any additional corporate tax payments for 1968 arising from the speedup of payments and from the surcharge described subsequently are to be paid in three equal payments, which for a calendar year corporation are to be made by June 15, September 15, and December 15.

Sec. 8.—Timely Mailing

This section, regarding the timely mailing of deposits, is the same in both the House and Senate versions of the bill.

Secs. 9 and 10.—Industrial Development Bonds

In the case of industrial development bonds, the conferees decided that the income on these bonds should be taxable in the case of any issue over $1 million. Industrial development bonds are those whose proceeds are used in an activity engaged in for profit by other than a governmental unit or other than an organization exempt from tax (but in this latter case only if the activity is related to the function upon which the organization's exemption is based) and on which either the payment of the principal and interest is secured in whole or in part by property or the payments received from property are pledged for payment of the interest and principal. Exceptions are provided in the case of sports facilities (such as stadiums), convention or trade show facilities, various types of transportation facilities, specified public utility facilities, air or water pollution abatement facilities, and facilities for industrial parks.

This provision is to be effective with respect to bonds issued on or after May 1, 1968, except where a commitment has been made before that time. In general terms, a commitment for this purpose includes cases where

(a) the issuance of the obligation, or the project, was approved by the governing body of the governmental unit issuing the obligation (or by the voters of the governmental unit);

(b) a governmental unit had made a significant financial commitment in connection with the project;

(c) a party other than the governmental unit had entered into contracts related to the use of the property for an amount equal to 20 percent or more of the proceeds; or

(d) a governmental agency concerned with economic development has approved a project or an application for financial assistance with respect to a project is pending before such an agency and the financial assistance is subsequently provided.

Sec. 11.—Advertising in Publications of Tax-Exempt Organizations

This Senate amendment provides that the advertising income which an exempt organization receives in publishing a periodical is to be exempt from the tax on unrelated trade or business income if the publication of the periodical is substantially related to the exempt activities of the organization.

The conferees deleted this amendment from the bill with the understanding that the Committee on Ways and Means would consider the matter later this year.

Sec. 12.—Joint Hospital Facilities

The conferees included in the bill the provision relating to tax-exempt status in the case of organizations providing joint services to hospitals on a cooperative basis but limited the application of this provision to cases where the organizations are providing such functions as computer services, purchasing services, laboratory services, personnel services, etc. (but not laundry services), for the member hospitals.

Sec. 13.—Advertising in a Political Convention Program

The conferees agreed to the provision in the Senate bill relating to advertising in a political convention program. Under the amendment, to be deductible, the expenses for advertising must be reasonable in light of the business the taxpayer may expect to receive directly as a result of this advertising or be reasonable in light of the business expected to be brought by the convention to the area in which the taxpayer has a principal place of business. In addition, the funds must be used only for convention expenses. (Under existing law no deduction would be allowed for expenses incurred in advertising in these programs.

Sec. 14.—Aid to Families with Dependent Children

This section contains three separate amendments relating to the AFDC program.

Freeze.—The first of these amendments would have repealed the so-called AFDC freeze contained in the Social Security Amendments of 1967 which limits Federal participation in AFDC payments to families, where the father is absent from the home, to the proportion of the under-age-18 population receiving such assistance in each State during the first quarter of 1968. The limitation would become effective July 1, 1968.

Under the conference bill, the date when this limitation will first go into effect is postponed for one year—from July 1, 1968, to July 1, 1969. In addition, provision is made for including within the base proportion of a state additional numbers of cases added to the state's rolls by the second quarter of 1969 by reason of the state's complying with a judicial decision of a court of competent jurisdiction affecting state laws relating to duration of residence requirements or so-called man-in-the-house rules. The fiscal year 1969 cost of this amendment is estimated at $125 million.

Unemployed Fathers—Unemployment Compensation.—The second of the Senate AFDC amendments would have deleted a provision contained in the Social Security Amendments of 1967 which prohibits payments under the unemployed fathers (AFDC–UF) program to a family for any month in which the father receives an unemployment compensation payment. The conference agreement substitutes a limitation under which this prohibition shall apply only to the specific weeks for which the father receives unemployment compensation payments. The fiscal year 1969 cost of this amendment is estimated at $2 million.

Unemployed Fathers—Attachment to the Work Force.—The third Senate AFDC amendment would have repealed the requirement that a father have a specified history of prior employment in order that the family be eligible for aid to families with dependent children.

The conferees deleted this Senate amendment and thus retained the work test in present law.

Sec. 15.—Family Planning

The Social Security Amendments of 1967 required a State to offer family planning services to all appropriate AFDC participants or lose a portion of Federal funds otherwise available for the State AFDC program. This Senate amendment provides that in the case of a State which does not now provide the required family planning services, the amendment in the Social Security Amendments of 1967 would not apply to that State until after the close of its next legislative session.

The conference agreement omits this amendment. The conference committee did not believe that the provisions of existing law require any State to take action contrary to State statute and expects the Department of Health, Education, and Welfare to so interpret and administer this provision.

Sec. 16.—Amendment to Medical Assistance (Medicaid) Program

Another Senate amendment relates to a provision contained in the Social Security Amendments of 1967 which prohibits Federal participation in payments under the title XIX program for services which would have been provided under Part B of medicare in states that had not elected to buy-in for their title XIX eligibles.

This provision, which penalizes some states, was not correctly timed when it was enacted, and it was not subject to amendment in the conference that was held last December on the Social Security bill.

The conference committee has agreed to postpone the effective date of this provision until July 1, 1970, and thus coordinate it with the date on which states are required under existing law to have title XIX programs in operation and the date when they may exercise their option to buy-in for title XIX eligibles.

The fiscal year 1969 cost of this amendment is estimated at $5 million,

Sec. 17.—Income Tax Surcharge

The conferees agreed to a 10 percent income tax surcharge applicable to both individuals and to corporations. In the case of individuals, the surcharge is to be effective for the period from April 1, 1968, through June 30, 1969. In the case of corporations, the surcharge is effective from January 1, 1968, though June 30, 1969.

The surcharge does not apply to individuals whose taxable income does not exceed the amount in the first two taxable income brackets ($1,000 of taxable income in the case of a single person and $2,000 in the case of a married couple). While the surcharge generally applies to the entire taxable income of persons with larger amounts of taxable income, in order to prevent a sudden tax increase just above the first two tax brackets, a provision applies which has the effect of gradually removing this exemption as income increases beyond the exempt level. The withholding in the case of individuals is to begin the 15th day after the date of enactment. In the case of individuals filing declarations, the increase will be reflected in declarations filed on September 15, in the case of calendar year taxpayers.

In the case of corporations, the surcharge is to apply before the application of tax credits.

Sec. 18.—Textile Quotas

The conferees agreed to delete the Senate amendment which would have established mandatory import quotas on textile articles, unless the President entered into agreements with foreign countries within 180 days after the date of enactment limiting the importation of such articles.

In deleting this Senate amendment the conferees understood that the Committee on Ways and Means would announce hearings to be held on all questions and issues raised in the field of international trade. (Concurrently with the announcement of the conference decision with respect to this amendment Honorable Wilbur D. Mills, Chairman of the House Ways and Means Committee issued the following statement:

MAY 9, 1968.

CHAIRMAN MILLS' STATEMENT RELATIVE TO TEXTILE AMENDMENT

The conference committee did not agree to include in the conference agreement the amendment of Senator Hollings concerning textile quotas.

However, I believe all members of the conference committee recognize the widespread concern not only in the textile industry but in many other industries about increasing imports, particularly in certain segments of our market. I think all the conferees also are concerned about our declining balance of trade, particularly since our balance of trade has been the most favorable item in our whole balance of payments picture.

Accordingly, I am announcing today that on June 4 the Committee on Ways and Means will begin extensive public hearings on the subject of the foreign trade of the United States. These hearings will include not only the Administration trade bill, which we understand will be sent to us prior to the hearing, but also a broad variety of proposals relative to both imports and to exports. Such subjects, for example, as quotas, either on an across-the-board or an item-by-item basis, American selling price, antidumping, will be included, among the other subjects.

This public hearing should provide the Committee on Ways and Means and the Congress a comprehensive view of the present and prospective position of the United States in international trade and should provide us an informed basis for any subsequent legislation in this vitally important field.

Sec. 19.—Foreign Nations Indebted to the United States

The conferees deleted the Senate amendment which would have (1) required the Secretary of the Treasury to demand payment of debts in arrears from all countries more than 90 days in arrears in the payment of principal or interest on debts owed the United States, and (2) provided that dollars presented to the Treasury by a country that is in arrears are not to be redeemed in gold but instead credited against the debts owed this country

In deleting this amendment, the conferees expect that the Secretary of the Treasury and the Secretary of State will study this matter and make a report to the Congress with respect to it.

Sec. 20.—Tax Reform

The conferees agreed to the Senate amendment which requires the President not later than December 31, 1968, to submit to the Congress proposals for a comprehensive reform of the Internal Revenue Code of 1954.

ESTIMATED REVENUE INCREASES DUE TO TAX PROVISIONS OF H.R. 15414—CONFERENCE ACTION

[In billions of dollars]

	Fiscal years	
	1968	1969
Excise taxes, extension of present rates:		
Automobiles	$0.2	$1.5
Telephone service	.1	1.2
Total, excise extension	.3	2.7
Corporations estimated tax payments	.5	.5
Surcharge:		
Individuals	[1] .1	[1] 7.7
Corporations	.6	3.2
Total surcharge	.7	10.9
Total revenue increase	1.5	14.0

[1] Assuming increased withholding June 10, 1968.

NOTE: Detail may not add to total due to rounding.

A full year liability at 1968 levels:	Billions
Individual	$6.8
Corporations	3.4
Total	10.2

Calendar No. 995

90TH CONGRESS
2d Session
SENATE
REPORT
No. 1014

TAX ADJUSTMENT ACT OF 1968

MARCH 15, 1968.—Ordered to be printed.

Mr. LONG of Louisiana, from the Committee on Finance, submitted the following

REPORT

[To accompany H.R. 15414]

The Committee on Finance, to which was referred the bill (H.R. 15414) to continue the existing excise tax rates on communication services and on automobiles, and to apply more generally the provisions relating to payments of estimated tax by corporations, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. SUMMARY

The House bill continues until December 31, 1969, existing excise taxes imposed with respect to manufacturers' sales of passenger automobiles and with respect to certain telephone services. Thereafter it provides for the gradual reduction and eventual elimination of these taxes. The committee accepted these provisions without change. The House bill also provides for the acceleration of income tax payments by corporations to place these payments of tax on a comparable basis to that applying in the case of individual taxpapers, including sole proprietors. The committee made two modifications in this latter provision. It also added a provision dealing with the tax treatment of interest on industrial development bonds. Further it added two public welfare amendments to the bill dealing with provisions which were passed by the Senate last year but not accepted in the conference on the Social Security Amendments Act, and one amendment related to the medical assistance (title XIX) program, All of these amendments added by your committee are summariaed below.

Finance Committee amendments.—Your committee modified the acceleration provisions as passed by the House to provide that the speedup of corporate income tax payments generally is not to apply with respect to the tax payable on the first $25,000 of taxable income (generally the level where the surtax exemption applies). In addition, the bill as passed by the House provides for "quickie refunds" in the case of overpayments of estimated tax. The House bill provides that such quickie refunds are not to be available unless the overpayment exceeds 105 percent of the then expected tax liability and also amounts to more than $200. Your committee has raised this limitation to 110 percent and $500.

The committee added an amendment to the bill providing that interest on industrial development bonds, which has been excluded from gross income as interest on a State or local government bond in accordance with the regulations previously in effect and the principles set forth in a series of revenue rulings, is to continue to be exempt from income tax unless otherwise provided by some future The law. Internal Revenue Service is directed to issue ruling letters with respect to these bonds in conformity with the statement indicated above.

Present law sets a limitation on Federal financial participation in the program for aid to families with dependent children, related to the proportion of the child population that could be aided because of the absence from the home of a parent. This limitation is deleted by the committee bill.

The committee bill removes certain provisions contained in present law which affect eligibility of children on AFDC when their father is unemployed. Specifically, the requirement that the father have six calendar quarters of work or have been entitled to unemployment compensation would be removed. In addition, the committee bill would permit a State at its option to make payments for a month in which the father received unemployment compensation. Under present law, receipt of any unemployment compensation would bar assistance for the month.

Under present law, effective January 1, 1968, States with medicaid programs which have not purchased part B medicare coverage (supplementary medical insurance) for those older citizens eligible for medicaid benefits, no longer receive Federal matching payments toward the cost of medical services which would have been reimbursable under part B of medicare had the State, in fact, purchased such coverage. The committee amendment postpones the effective date of the cutoff of Federal funds in such cases to January 1, 1970.

Revenue effect.—While this bill does not increase tax liabilities above those now payable, it is estimated the changes made by this bill as amended by your committee will increase tax collections by about $1 billion in fiscal year 1968 and by about $2.9 billion in fiscal year 1969. The larger revenues in part are attributable to continuing existing excise tax rates and in part to speeding up the collection of existing corporation tax liabilities. The public welfare provisions adopted by your committee will involve payments of $15 million in fiscal year 1968 and $134 million in the fiscal year 1969. The House bill as amended by your committee, therefore, will reduce the deficit by about $1 billion in fiscal year 1968 and by about $2.8 billion in fiscal year 1969.

Reasons for action.—In view of the budget deficits in excess of $20 billion forecast in both 1968 and 1969, without taking into account proposed tax increases, it appeared inappropriate to allow a reduction in existing excise tax rates. Moreover, it appeared to be an appropriate time to take further action to place corporation income tax payments on a more current basis. At the same time, however, provision is made for quick refunds for corporations after the end of the year in those cases where their estimated tax payments significantly exceed their tax liabilities.

Other House bill provisions.—To simplify compliance for corporations, both the House and your committee's bill repeal the present requirement that corporations file a declaration of estimated tax. This does not affect existing payment procedures.

Both versions of the bill also establish that a deposit of tax is to be considered to be paid on time if it is mailed to a depositary at least by the second day before the due date.

II. GENERAL STATEMENT

The President's budget message estimates receipts and expenditures under the new unified budget, before taking into account the President's proposals with respect to tax legislation in fiscal years 1968 and 1969, at the following levels: [1]

BUDGET TOTALS FOR FISCAL YEARS 1968 AND 1969

[In millions of dollars]

	1968	1969
Receipts excluding effect of tax proposals	152,824	164,951
Expenditures and net lending	175,635	186,062
Deficit	22,811	21,111

These data indicate deficits of $22.8 billion in 1968 and $21.1 billion in 1969.

With prospective deficits of such magnitudes, your committee agrees with the House that it is inappropriate to permit reductions in the excise taxes to occur in 1968 or 1969 as scheduled by existing law. It also agrees that this is an appropriate time to remove disparity in the treatment of individuals and corporations under the current tax payment system. These actions also will undoubtedly aid from the standpoint of our present international financial position.

In view of the fact that the excise tax reductions, in the absence of this bill, would occur on April 1, and the fact that the speed-up of corporation income tax payments must occur before April 15 to be fully effective this year, your committee concluded that it is essential to act now on these recommendations.

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[1] The administrative budget estimates are as follows:

[In millions of dollars]

	1968	1969
Receipts excluding effect of tax proposals	115,569	122,669
Expenditures	137,182	147,363
Deficit	21,613	24,694

Excise tax extensions

Under present law the 7-percent manufacturers excise tax on passenger automobiles [2] is scheduled to drop from 7 to 2 percent on April 1, 1968, and then on January 1, 1969, to drop to 1 percent. The 1-percent rate under present law is to be a permanent tax. Your committee has concluded, as did the House, that the present 7-percent rate of tax should be continued until 1970.

Your committee is also in accord with the House that reductions in the manufacturers excise tax on passenger automobiles should be enacted in a series of gradual steps to prevent possible dislocations in the industry. It agrees that the anticipation by consumers of a substantial reduction in the excise tax rate might delay purchases of new automobiles for a period before the rate reduction actually took place. Therefore, the House bill and your committee's bill provide for the reduction in the excise tax on passenger automobiles in a series of steps which is to begin on January 1, 1970, and conclude on January 1, 1973, with the repeal of the tax. As indicated previously, under existing law the tax would have been retained at a permanent level of 1 percent.

Under present law the excise tax on local telephone service, toll service, and teletypewriter exchange service is scheduled to be reduced from 10 percent to 1 percent as of April 1, 1968, and on January 1, 1969, the 1 percent tax is to be repealed. Your committee has concluded, as did the House, that the present 10-percent rate of tax should be continued until 1970.

Your committee's bill and the House bill provide a schedule of rate reductions for the tax on telephone service comparable to that provided in the case of passenger automobiles; that is, the 10-percent rate on these various types of telephone service is reduced to 5 percent as of January 1, 1970, and is reduced by 2 percentage points a year thereafter until 1973, when the final 1 percent tax is removed.

Current payment of corporation income tax liabilities

In view of the budgetary outlook, it appeared appropriate now to take further action to place corporations under substantially the same obligations with respect to the current payment of income tax liabilities as those placed upon individuals and unincorporated businesses.

This objective has long been sought by Congress. Action was taken in each of the revenue acts of 1950, 1954, 1964, and 1966 to place the payment of corporate tax liabilities on more nearly the same basis as that of individuals and unincorporated businesses. The development has been gradual because of a desire to ease possible transitional problems for the corporations involved, but commitment to the objective has not varied.

For these reasons, the House bill and your committee's bill raise the percentage of estimated tax liability necessary to be paid currently by corporations from 70 to 80 percent—the percentage applicable to individuals. This change is made fully effective for 1968 tax liabilities.

The bill as passed by the House also reduced the exemption from the corporate current payment provisions from $100,000 to $40.

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[2] Passenger automobile chassis and bodies and other chassis and bodies for trailers and semitrailers (other than housetrailers) suitable for use in connection with passenger automobiles.

The bill as modified by your committee also substantially reduces this exemption for corporations below $100,000. However, your committee believes that it is desirable to maintain a favored position for corporate small business because of its difficulties in obtaining adequate financing. For that reason it has reduced the exemption from the corporate current payment provisions from $100,000 to the level at which the surtax exemption applies, generally, $25,000 of taxable income, or $5,500 of tax. The first $25,000 of taxable income is the amount which Congress previously decided should be exempt from the 26 percent surtax rate applicable to higher incomes. Therefore, deferring tax payments on income below this level is consistent with the existing policy of preferential treatment for these small incomes.

The reduction of the exemption from current payment provisions under your committee's action, as under the House action, is made effective gradually over a 5-year period beginning with 1968 tax liabilities. This is accomplished by requiring the inclusion in 1968 (in addition to tax liabilities in excess of $100,000) of 20 percent of the tax liabilities between $100,000 and $5,500, by increasing this to 40 percent for 1969 liabilities, 60 percent for 1970 liabilities, 80 percent for 1971 liabilities, and 100 percent for 1972 liabilities and the liabilities of later years.

The reduction of the $100,000 exemption for corporate estimated tax payments is phased in because it is believed that to do otherwise would impose a hardship on many corporations not now required to make quarterly payments of estimated tax and also on those corporations which will be required to make substantial increases in the amount of estimated tax they pay.

Another provision of the bill will simplify the estimated tax payment requirements of corporations by repealing the existing requirement that corporations file declarations of their estimated tax. Under the terms of the bill, corporations will not have to complete a form indicating the manner in which they determine their estimated tax payments, but will merely have to make those payments on or before the quarterly due dates.

Your committee also has agreed to a further change designed to ease the impact of the current payment provisions on corporations. It recognizes that applying the new system might in some cases result in substantial overpayments by corporate taxpayers if the final results of their operations fall below their expectations in the forepart of the year, since the last estimated tax payment by corporations is required to be made before the end of their tax year. These overpayments could result from such circumstances as the burning or flooding out of a business, a strike, or a sharp downturn in expected sales. For some of these firms the overpayment of estimated tax may create a cash shortage at the very time the need is the greatest. These corporations cannot obtain a refund of estimated tax under current law until they file their tax returns. However, many corporations have difficulty filing their returns within 2½ months after the close of their tax year and must ask for a 3-or 6-month extension before filing their returns. This delays still further the time when any overpayment of estimated tax can be refunded to them.

For these reasons your committee has endorsed the provision of the House bill which permits a corporation to obtain a quick refund of overpayment of estimated tax by filing an application during the period between the end of its taxable year and the time it files its tax return for that year (or the due date of the return if earlier). When these quick refund applications are filed, the Internal Revenue Service is to make payment within 45 days. The refund in this case is only available with respect to estimated tax payments in excess of the tax liability reasonably estimated at that time, and not the 80 percent of estimated tax liability on which the earlier payments may be made.

To prevent the use of this quick refund provision where the amounts are small, the bill passed by the House provided that the refund is to be made only where the estimated payments have equaled or exceeded 105 percent of tax liability and the excess payments equal or exceed $200. Your committee concluded that the limits provided in the House bill should be raised to 110 percent of tax liability and a minimum of $500 to insure that the quick refund provision will only be used when the amounts are significant.

Timely mailing treated as timely deposit

At the present time taxpayers who are required to deposit payments of estimated, withheld income, employment, or excise taxes in a designated bank for tax collection purposes must bear the responsibility for insuring that the payment reaches the depositary on or before the specified due date. It has been pointed out that this places the responsibility for delays which occur in the delivery of mail on the taxpayer. Taxpayers, particularly those whose headquarters are located at some distance from the depositary banks they may wish to use, must mail deposits well in advance of the due date to avoid the risk of an additional tax if there is a delay in the mails. Under legislation passed in 1954, certain documents and claims are held to be filed on time if they were timely mailed. In 1966, this treatment was extended to returns and payments of tax. Your committee agrees with the House that similar treatment should be provided with respect to deposits of tax and endorses the provision of the House bill under which a deposit received at the depositary bank after the due date is to be considered received on or before the due date if it is mailed on or before the second day prior to the due date.

Interest on industrial development bonds

The Treasury Department on March 6 announced (in TIR 972) that it was reconsidering its position on the tax-exempt status, under section 103 of the Internal Revenue Code, of interest paid on industrial development bonds. These are bonds issued by, or on behalf of, a municipality or other political subdivision where the bonds are used to finance the purchase and/or construction of a facility to be leased to a private corporation. The bonds in these cases are usually amortized wholly from the rental payments received from the private corporation.

The Treasury Department stated that proposed regulations concerning industrial development bonds would be published which would provide that these bonds would not be considered obligations of a State or local government within the meaning of section 103(a)(1) of the Internal Revenue Code. It was announced that these regulations would apply to bonds sold after March 15, 1968, and the Treasury announced that effective March 15, 1968, it is withdrawing its rulings holding industrial revenue bonds to be exempt. In applying this effective date, it was stated that bonds would be considered sold on the date when a buyer or underwriter enters into a binding contract with the issuer to purchase the bonds at a fixed price.

The Committee on Finance is concerned that the Treasury Department in taking this action is, in effect, legislating on this subject. It does not believe that a change should be made in the status of the interest on these bonds without specific legislative action on the part of the Congress.

For the reasons indicated above, your committee has added a section (sec. 5) to the bill providing that interest on industrial revenue bonds is to be excluded from gross income under section 103 of the Internal Revenue Code in accordance with the regulations prescribed by the Treasury Department as in effect on March 13, 1968, and in accordance with the principles set forth in three revenue rulings; namely, revenue ruling 54–106, revenue ruling 57–187, and revenue ruling 63–20. In addition, the section provides that the Internal Revenue Service is authorized and directed to issue ruling letters with respect to industrial development bonds in conformity with the position stated above.

The revenue rulings referred to in general provide as follows:

Revenue Ruling 54–106 (C.B. 1954–1, 28) provides that bonds issued by a municipality for the construction of municipally owned industrial plants for lease to private enterprises constitute obligations of a political subdivision within the meaning of what is now section 103(a)(1) of the Internal Revenue Code and that interest on these bonds is exempt from Federal income tax notwithstanding the purpose for which they were issued or the fact that the promise to pay is limited to the revenue to be derived from leasing the property. It is also stated that it is not necessary for this purpose that the obligation be a general one pledging the general credit of the municipality or the use of its taxing power.

Revenue Ruling 57–187 (C.B. 1957–1, 65) holds that interest on bonds issued by an industrial development board formed under a State statute is exempt from Federal income taxes under section 103(a)(1) of the Internal Revenue Code. In this case the bonds were payable only out of the revenue produced by the property in question, the industrial development boards (and the interest on the bonds) were exempt from all State taxes, and upon the dissolution of any such board the title to the property owned by it was to become the property of the municipality in which the board was located.

Revenue Ruling 63–20 (C.B. 1963–1, 24) states that obligations issued by a nonprofit corporation formed for the purpose of stimulating industrial development would be considered issued "on behalf of" a political subdivision for purposes of section 1.103.1 of the income tax regulations where the following five requirements were met:

(1) The corporation must engage in activities which are essentially public in nature;

(2) The corporation must be one which is not organized for profit (except to the extent of retiring indebtedness);

(3) The corporate income must not inure to any private person;

(4) The State or political subdivision must have a beneficial interest in the corporation while the indebtedness remains outstanding and must obtain full legal title to the property upon retirement of the indebtedness; and

(5) The corporation must have been approved by the State or political subdivision and the State or political subdivision must also have approved of the obligations issued by the corporation.

Repeal of limitation on Federal participation in Aid to Families with Dependent Children

The Social Security Amendments of 1967 set a limitation on Federal financial participation in the AFDC program related to the proportion of the child population under age 18 aided because of the absence of a parent from the home. Under the limitation, this proportion is calculated based on the child population in each State on January 1, 1968, and the average monthly number of children dependent because of the absence of a parent during the first calendar quarter of 1968. The limitation becomes effective July 1, 1968.

The House version of the 1967 amendments contained this limitation (though with different dates); the Senate version did not. In the conference the Department of Health, Education, and Welfare presented estimates that the limitation would not reduce Federal participation in assistance payments because of the effect of the work incentive provisions of the amendments, in reducing the number of people on the rolls.

The Department has subsequently revised these estimates, and the President's budget (p. 462) states that assistance payments to about 475,000 AFDC recipients will not receive Federal matching totaling $125 million in fiscal year 1969. It is unlikely that the conference committee would have acted as it did if the members had been aware of the effects now predicted by the Department of Health, Education, and Welfare.

At the same time, there have been other developments which will have a major impact on the AFDC limitation as it applies to some States. Court decisions in a number of States, including Connecticut, Delaware, the District of Columbia, Wisconsin, and Pennsylvania, have forced those States to eliminate eligibility requirements based on length of residence. A court decision in Alabama, and litigation in process in Louisiana, would not permit those States to declare families ineligible for assistance because of the presence of a man in the house who is not married to the mother of the family.

Some 40 States now have requirements based on length of residence; 18 States have man-in-the-house rules. The Department of Health, Education, and Welfare estimates that in the United States as a whole, a range of from 200,000 to 400,000 AFDC recipients might be added to the rolls if all States eliminated the man-in-the-house rule; another 100,000 to 200,000 AFDC recipients could be added to the rolls with the elimination of duration-of-residence related requirements.

If court decisions prohibit these requirements, the unforeseen new recipients will place an additional burden on the States affected. For the most part, there will be no Federal financial participation on their behalf under present law since they will exceed the number of recipients in the first calendar quarter of 1968, the period used in calculating the proportion of the child population affected by the Federal limitation.

For these reasons, the committee again recommends that the limitation on Federal participation be deleted.

Assistance to families with unemployed fathers

Federal participation in assistance to children dependent because of their father's unemployment began in 1961. But the Social Security Amendments of 1967 for the first time authorized a Federal definition of "unemployment," and tied the program to the new work-incentive program established in the same bill.

Two provisions of last year's House bill were deleted in the Senate but restored in conference. The first of these provisions requires that in order to qualify for assistance on the basis of unemployment, a father must meet certain tests of prior attachment to the labor force. While the committee does not wish to encourage irresponsible marriages, it believes that no one needs the advantages of the work and training programs more than the man who has a wife and children but has no significant history of employment. The committee bill returns to last year's Senate bill by not including work attachment requirements.

The second provision of present law prohibits the payment of assistance (with Federal participation) to a family when the father receives any amount of unemployment compensation during the same month. Since the unemployment compensation may be for only a small part of the month, a family's income could be far below the State's standard of need and still the family would be ineligible for federally aided assistance.

The committee bill returns to last year's Senate bill under which the choice as to whether unemployment compensation payments can be supplemented is left to the States.

Medical assistance (medicaid)

Public Law 90–248 extended the period during which States could elect to cover under part B of medicare those aged cash assistance recipients eligible for medicaid. States now have until January 1, 1970, to make such election rather than the January 1, 1968, date which obtained under prior law. Aged persons not receiving cash assistance but eligible for medicaid were also authorized to be included in a State's "buy-in" group as well as those persons who first go on medicaid rolls after 1967.

Public Law 90–248 further provided that there would be no Federal matching toward the States' share of buying-in for those medicaid eligibles who were not also cash assistance recipients.

Additionally, the new law prohibits, effective January 1, 1968, the payment of Federal matching funds under title XIX toward the cost of services which would have been covered under the supplementary medical insurance program had a State purchased such coverage for its medicaid eligibles. For example, a medicaid eligible in a State with a title XIX program is operated on in a hospital. The surgeon's charge would have been a covered service under part B of medicare had the State enrolled this recipient in part B. However, inasmuch as the State did not so elect, the surgeon's fee is payable wholly from State funds—no Federal matching is available toward that expense as would ordinarily be payable toward a title XIX medical vendor payment.

The basic purposes of the above provisions are to encourage employment of a uniform mechanism—part B of medicare—in the governmental programs designed to cover medical costs of older people and to assure the broadest possible participation of older persons in the supplementary medical insurance plan.

The general revenues of the Federal Government bear a substantial portion of the total part B premium cost for both welfare and nonwelfare participants. Effective April 1968, this amounts to a Federal share of $4 monthly of the total $8 monthly premium cost for each participant in the program. In view of this general revenue contribution, the Congress did not find it appropriate to authorize additional Federal payment toward the $4 per person cost incurred by a State in buying-in for medically needy persons. However, the Congress did find it appropriate to continue Federal matching payments under title XIX toward the $4 monthly cost incurred with respect to eligible individuals who are also cash assistance recipients.

The committee amendment would not alter any of the objectives of the buy-in. It would simply postpone to January 1, 1970, the date when Federal matching payments would no longer be payable for medical services which could have been covered under part B of Medicare had a State elected to buy-in for its title XIX eligibles.

There are several sound reasons for this postponement:

1. States which did not buy in did not have a reasonable opportunity to do so following enactment of a law which, in effect, makes the buy-in virtually mandatory. Public Law 90-248 was not signed by the President until January 2, 1968, and yet the cutoff of Federal matching became effective January 1, 1968.

2. Postponement until January 1, 1970, coordinates the operation of the buy-in restriction with the effective date of two other related requirements. Under present law, States are required to have title XIX programs by that date or forfeit Federal matching for all of their medical assistance programs. Further, as has been noted, under Public Law 90-248, States have until January 1, 1970, to elect to buy in part B coverage.

3. Delay of the cutoff of matching for medical services which could have been covered under the buy-in will also avoid penalizing those States which elected to participate in title XIX prior to January 1, 1970. In contrast, States which delay entry into title XIX and which do not purchase part B coverage can continue to receive Federal matching for vendor payments made in behalf of aged recipients under titles I and XVI—despite the fact that those same services could have been covered under part B of medicare. The committee amendment thus treats the 50 States equally and equitably.

4. Delay of the Federal matching prohibition until January 1, 1970, will also provide a reasonable opportunity for those States which have not bought-in to seek necessary approvals and appropriations from their legislatures. Orderly budgeting and administration will be enhanced by the additional time provided under the committee amendment.

The need to allow an adequate opportunity for consideration of the buy-in by State legislatures is further underlined because legislatures will undoubtedly want to consider this question in the context of the limitations on eligibility and other modifications to title XIX included in Public Law 90-248. The matter of the buy-in is not necessarily separable from these other title XIX considerations.

The need for prompt action

The measures proposed in the House bill and your committee's bill should be enacted promptly. The existing excise tax rates on passenger automobiles and telephone service will fall sharply at the end of this month unless legislative action is taken to prevent the reductions. Furthermore, buyers may begin to postpone purchases of autos in expectation of the scheduled reductions unless Congressional action is completed soon. The longer the delay in the action to extend the excise tax rates, the greater is the risk that the volume of deferred purchases will become substantial. Prompt action also is necessary on the provisions regarding the current payment of corporate tax liabilities. These provisions will provide a substantial increase in tax receipts in fiscal year 1968 only if they are enacted in time for corporations to put them into effect before the April 15 and June 15 estimated tax payment due dates for corporations that use the calendar year as their tax year.

Revenue effects

As indicated in the following table, this bill is expected to increase tax receipts in fiscal year 1968 by $986 million and in fiscal year 1969 by $2,940 million.

The $680 million increase in receipts from the provisions to accelerate corporate tax payments which is estimated for fiscal year 1968 under the bill as amended by your committee reflects the combined impact of the increase in the percentage of tax required to be paid currently to avoid an addition to tax and a reduction in the current exemption level. Since the reduction in the exemption level is to be phased over a 5-year period, receipts in each of the fiscal years 1969 through 1972 will also be increased by $280 million a year. The impact of the increase of 70 to 80 percent in the amount of tax liability which must be paid currently to avoid additions to tax will increase receipts by $400 million only in fiscal year 1968. The increase in revenue from the excise tax extensions is small in fiscal year 1968 since the extensions are to apply only for 3 months in this fiscal year.

It is estimated that the public welfare amendments approved by your committee will increase Federal payments by $15 million in the fiscal year 1968 and $134 million in the fiscal year 1969.

The bill as amended by your committee will, therefore, reduce the deficit in fiscal year 1968 by $971 million and will decrease the deficit in fiscal year 1969 by $2,806 million.

The bill as approved by the House would have increased fiscal year 1968 receipts by $1.106 billion and fiscal year 1969 receipts by $3.060 billion.

ESTIMATES OF THE EFFECT ON BUDGET OF H.R. 15414 AS AMENDED BY THE FINANCE COMMITTEE

[In millions of dollars]

	Fiscal year 1968	Fiscal year 1969
a. Increase in receipts:		
Excise taxes—Extension of present rates:		
Passenger automobiles	190	1,500
Telephone service	116	1,160
Total, excise extensions	306	2,660
Proposals for corporate estimated tax payments	680	280
Total revenue provisions	986	2,940
b. Increase in expenditures: Public welfare provisions	15	134
c. Net reduction in deficit	971	2,806

III. GENERAL EXPLANATION OF EXCISE CHANGES AND ACCELERATION PROVISIONS, ETC.

1. *The excise tax on passenger automobiles* (*sec. 2(a) of the bill and sec. 4061 of the code*)

Present law.—As a result of amendments in the Excise Tax Reduction Act of 1965 and the Tax Adjustment Act of 1966, the excise tax on passenger automobiles (imposed on the manufacturer's price) is 7 percent. Before the passage of the Excise Tax Reduction Act, the rate was 10 percent. Under the amendments made by those acts, the rate now is scheduled to fall from 7 to 2 percent on April 1 of the current year, and to a permanent rate of 1 percent on January 1, 1969.

Explanation of provisions.—Both the committee and the House substitute a new timetable for the scheduled reductions in the excise tax on passenger automobiles. In addition, it provides for the repeal of the tax effective January 1, 1973.

The new timetable postpones the scheduled reductions in the excise tax on passenger automobiles for a temporary period. At the same time it tempers the effect that the scheduled reductions would have on consumer purchases—as previously described—by providing for a gradual reduction in rate. Finally, the new timetable provides for the repeal of the tax at the end of the postponement period.

Under the bill, the present 7-percent excise tax on passenger automobiles is to continue until January 1, 1970. On that date the rate is to fall to 5 percent. Further annual reductions of 2 percentage points each then are to occur on January 1, 1971, and January 1, 1972, as the rate falls from 5 to 3 percent and from 3 to 1 percent, respectively. On January 1, 1973, the tax rate is to fall to zero. As in the past, refunds are to be paid to dealers with respect to automobiles held in inventory on the date of any rate reduction. The bill provides the following schedule of excise tax rates applicable in the case of passenger automobiles:

	Percent
Before Jan. 1, 1970	7
During 1970	5
During 1971	3
During 1972	1
Thereafter	0

2. *The excise tax on communications* (*sec. 2(b) of the bill and sec. 4251 of the code*)

Present law.—Present law imposes a 10-percent excise tax on amounts paid for local and toll telephone and teletypewriter exchange service. Scheduled reductions under the Excise Tax Reduction Act of 1965 and the Tax Adjustment Act of 1966 call for the tax to fall to 1 percent on April 1, 1968, and for its repeal on January 1, 1969.

Explanation of provisions.—Both the committee and the House bills postpone the scheduled repeal of the excise tax on telephone services and teletypewriter service. It also provides for a graduated reduction in the rate before the rate falls to zero on January 1, 1973.

In taking the action described above, your committee continues to recognize, as it stated at the time of the Excise Tax Reduction Act of 1965, "that the tax on local and toll telephone service and teletypewriter exchange service is undesirable as a permanent feature of our excise tax system." The committee also recognizes, however, that "while elimination of the tax is desirable * * *, since the tax is an important source of revenue for the Federal Government, reduction should be staged over a period of years."

Under the bill, the scheduled reduction and repeal of the excise tax on telephone services and teletypewriter service generally parallels the scheduled reduction and repeal of the excise tax on passenger automobiles. Thus, the present 10-percent rate is to continue until January 1, 1970, when it is to fall to 5 percent—the same rate then scheduled for the automobile excise tax. Annual reductions of 2 percentage points each then are to occur on January 1, 1971, and January 1, 1972, so that the tax rate is to be 3 percent in 1971 and 1 percent in 1972. On January 1, 1973, the tax is to cease. As under existing law, in applying these new rates, bills for services before November 1 of a calendar year are to bear the tax of that year even if the bill for the services is not rendered before the close of the year. As a result the schedule of rates under the House bill and your committee's bill in the case of these telephone services is as follows:

	Percent
Before Jan. 1, 1970	10
During 1970	5
During 1971	3
During 1972	1
Thereafter	0

3. *Repeal of requirement for filing declaration of estimated tax (sec. 3(a) of the bill and secs. 6016 and 6074 of the code)*

Present law.—Present law requires a corporation with an estimated income tax (after credits) in excess of $100,000 to file a declaration of estimated tax in the current year. A corporation subject to the filing requirement also must make payments of estimated tax in the current year. Payments are deposited with authorized banks by using deposit forms provided by the Treasury.

With the shift in 1967 to the collection of estimated tax of corporations through the use of banks as depositaries, the filing of declarations of estimated tax by corporate taxpayers became unnecessary. The declarations formerly were used as a means of identifying and billing the taxpayer but since shifting to the depositary system, the Service supplies the taxpayer with deposit forms for each quarterly payment, which contain the taxpayer's identifying number. The deposit forms provide both the Service and the corporation (through the retention of a stub) with a record of payments and also serve as reminder to the corporation as to when payments are due.

Explanation of provisions.—Your committee's bill and the House bill repeal the requirement that a corporation file a declaration of estimated tax. This action is taken because there is no justification for requiring a corporation to continue filing a form which, under present practices, serves no useful purpose. Elimination of the requirement for filing this form will simplify present practices both for the corporate taxpayer and for the Internal Revenue Service. The repeal of the filing requirement, however, does not change the requirements regarding the payments of estimated tax by a corporation.

4. *Payment of estimated tax by corporation on tax liability below $100,000 (sec. 3(b) of the bill and sec. 6154 of the code)*

Present law.—Before the amendments made by the Revenue Act of 1950, a corporation had the option of paying its entire tax on the

15th day of the third month following the close of its taxable year or of paying one-fourth of its tax on that date and the balance in equal quarterly installments on the 15th day of the third, sixth, and ninth months following the month of the first installment. The amendments made by the 1950 Revenue Act provided for an acceleration of the installment payments of tax liability over a 5-year transitional period. As a result, at the end of the transitional period, a corporation had to pay either all or one-half of its tax on the 15th day of the third month following the close of its taxable year; if it elected to pay only one-half of its liability at that time, it had to pay the balance 3 months later.

Provisions added by the Internal Revenue Code of 1954 now require a corporation with an estimated income tax (after credits) in excess of $100,000 to file a declaration and make payments of estimated tax in the current year. A corporation whose estimated income tax (after credits) does not exceed $100,000 is not subject to the requirements; one whose estimated income tax (after credits) does exceed $100,000 is subject to the requirements only to the extent of the excess.

As a result of amendments made by the Revenue Act of 1964 and the Tax Adjustment Act of 1966, estimated tax payments for calendar year corporations now are payable in four equal installments on April 15, June 15, September 15, and December 15. In total the payments must equal the amount of the tax shown on the return less $100,000. However, no underpayment, for purposes of imposing an addition to tax, results if the corporation pays 70 percent of this amount.

A corporation required to make estimated tax payments may avoid an addition to tax for an underpayment, as previously described, if it comes within one of three exceptions. The first exception allows a corporation to pay an amount equal to the prior year's tax reported on its return in lieu of its current year's estimate. A second exception determines the amount payable by reference to the results of the corporation's operations in the prior year but at the current year's income tax rates. The third exception determines the amount payable by reference to the corporation's income in the months preceding the payment; the corporation annualizes this income and must pay 70 percent of the tax determined on this annualized amount. The $100,000 corporate exemption noted above also applies in the case of each of these exceptions.

Explanation of provisions.—The bill as reported by your committee provides for a reduction in the present $100,000 corporate exemption from the estimated taxpayments requirement. As in the past, your committee again is providing for a 5-year transitional period in this regard. At the end of the transitional period, the corporate exemption from the estimated taxpayments requirement is to be the same as the exemption which the corporation enjoys under existing law from the corporate surtax; that is, the corporation (unless it is a member of an affiliated group, which is to divide one exemption among its members) is not to be required to make estimated taxpayments with respect to its first $25,000 of estimated taxable income (or its first $5,500 of estimated tax liability). In addition, under an amendment made by your committee, only if a corporation's estimated income tax exceeds $5,500 by at least $40 is it to be required to make estimated taxpayments. The House bill would have reduced the present $100,000 exemption to $40 over a 5-year transitional period.

Under the bill the substitution of the new surtax exemption for the existing $100,000 corporate exemption is to be phased in over a 5-year period with taxable years beginning in 1968. This phasein, provided to allow a corporation time to arrange its financial affairs to meet the new estimated tax payments requirement, is accomplished by providing a "transitional exemption" during the 5-year period. This transitional exemption is a percentage of the difference between the first $100,000 of the corporation's extimated income tax (after credits) and $5,500 (or a smaller amount in the case of multiple surtax exemptions). This percentage, called the exclusion percentage, falls from 80 percent in 1968 to 60 percent in 1969, to 40 percent in 1970, to 20 percent in 1971, and is eliminated in 1972. An example will illustrate how the new surtax exemption and the transitional exemption are to apply.

Assume that in 1968 a corporation has a tax liability of $100,000. The corporation in this case does not have to make estimated taxpayments with respect to the first $5,500 of its estimated tax liability. In addition, it does not have to make estimated tax-payments with respect to its transitional exemption. In 1968, this exemption is 80 percent of the difference between the corporation's $100,000 of estimated tax liability and its $5,500 exemption. Thus, in this case the corporation's transitional exemption is $75,600 (or 80 percent of $94,500). The corporation, therefore, must make estimated tax-payments of $18,900 ($100,000 minus $75,600 minus $5,500). In 1969, when the transitional exemption is to fall to 60 percent, the corporation's estimated tax-payments, if its income remains the same, are to equal $37,800 since in that year the corporation's transitional exemption is to be $56,700 which together with its $5,500 exemption accounts for the aggregate exemption of $62,200.

As a result of the above described manner of phasing out the existing $100,000 exemption and substituting the new surtax exemption in its stead, a corporation whose estimated income tax (after credits) exceeds $5,500 is to pay an increasing amount in estimated tax each year until the end of the transition period. As noted above, the phasein gives the corporation time to arrange its financing to meet the new requirements in an orderly fashion. At the same time the phasein requires all corporations whose estimated tax exceeds $5,500 to begin immediately to pay some of their tax currently.

5. *Increase from 70 to 80 percent in liability corporation must pay by estimated tax to avoid addition to tax (sec. 3(c) of the bill and sec. 6655 of the code)*

Present law.—Present law imposes an addition to tax if a corporation fails to pay its estimated tax. This addition is at the rate of 6 percent per annum on the amount of the underpayment. An underpayment is the difference between an actual payment and 70 percent of the payment that the corporation would have owed if its estimated tax had been accurately determined; that is, if its estimated tax equaled its actual tax for the year as subsequently shown on its income tax return (determined for this purpose with regard to the $100,000 exemption from the estimated tax payments referred to previously). The 70-percent test applies with respect to each installment payment.

As previously indicated, a corporation may avoid the addition to tax for an underpayment if it comes within one of three exceptions. The first of these exceptions allows a corporation to pay an amount equal to the prior year's tax reported on its return in lieu of its current year's estimate. The second exception determines the amount payable by reference to the results of the corporation's operations in the prior year but applies the current year's income tax rates. The third exception determines the amount payable by reference to the corporation's income in the months preceding the payment.

The last exception noted above, which determines the amount of a payment necessary to avoid the addition to tax by reference to the corporation's income for the months preceding the payment, also has a 70-percent test. Under this exception the corporation may annualize its income for the months preceding an installment payment and determine the tax for the year (above the $100,000 exemption) on this annualized amount. The corporation then may avoid the addition to tax by making an estimated payment equal to 70 percent of the payment it would owe if its estimated tax were the tax on this annualized amount.

As a result of amendments made by the Tax Adjustment Act of 1966, the two 70-percent tests noted above are 80-percent tests in the case of an individual businessman. Before that act raised the percentage test for the individual, the corporate and individual taxpayer had been treated alike in this regard.

Explanation of provisions.—Your committee's bill and the House bill raise the two 70-percent tests noted above for a corporate taxpayer to 80 percent. This provision is effective for taxable years beginning in 1968. Thus, under the bill, to avoid an addition to tax, a corporation's estimated tax payments in 1968 must equal 80 percent of the tax liability it shows on its income tax return (determined with regard to the transitional rules explained above for reducing the $100,000 exemption to $5,500). Alternatively, if it uses the annualization rule to avoid additions to tax, the payments must equal 80 percent of its tax as determined by annualizing the corporate income for the appropriate months preceding the payment. In the latter case, also, the determination is made with regard to the transitional rules for reducing the $100,000 exemption.

An example will illustrate the interaction of the new 80-percent test and the transitional exemption during the period of the phasein of the $5,500 exemption:

Assume a corporation, as in the example above, has an estimated tax liability of $100,000 in 1968. As the result of its surtax exemption and its transitional exemption, the corporation is required to make estimated taxpayments of $18,900 in that year (as explained above). Thus, it may avoid an addition to tax if it pays only $15,120 (or 80 percent of $18,900). In 1969, when the corporation's transitional exemption is to fall to 60 percent, the corporation's required estimated taxpayments, if its estimated taxable income remains the same, are to equal $37,800. It may avoid an addition to tax in that year if it pays only $30,240 (or 80 percent of $37,800).

In raising the 70-percent tests to 80 percent, the bill restores the balance between the corporate taxpayer and the individual which existed before the 1966 amendments. Moreover, in raising the percentage tests (as in phasing out the existing exemption) the bill also brings corporations closer to a full-pay-as-you-go basis.

6. *Quick refund of overpayment of estimated income tax by corporation (sec. 3(d) of the bill and sec. 6425 of the code)*

Present law.—As previously indicated, existing law requires a corporation with an estimated income tax in excess of $100,000 to file a declaration and make payments of its estimated tax in the current year. If the total of these payments exceeds the tax shown on the return, the corporation may claim the overpayment as a refund. It may not claim this refund, however, until it files its income tax return for the year. Unlike the individual, who makes his last installment payment after the close of the year, the corporation must complete its payments during the year, and therefore cannot reduce these payments to reflect yearend losses.

Present law generally requires a corporation on a calendar year to file an income tax return by March 15. The corporation may claim automatic 3- or 6-month extensions of time for filing, however, merely by filing requests (but it is required to make payments of proper estimates of tax on the March 15 due date). The result is that a calendar year corporation often does not file its income tax return until sometime in September, more than 8 months after the close of its taxable year. Even then, the Internal Revenue Service may wait another 45 days before refunding any overpayment of tax without paying interest on the overpayment. Thus, a total of 10 months may elapse between the close of the year and the time a corporation receives a refund of an overpayment of tax.

Explanation of provisions.—Your committee's bill and the House bill allow a corporation to apply for a quick refund or, more technically, an adjustment of overpayment of estimated tax, immediately after the close of its taxable year. Under the House bill a corporation could do so when its current revised estimate of its income tax liability shows that its estimated taxpayments exceed its revised estimate by at least 5 percent of the revised estimate and that the excess amounts to at least $200. Under your committee's bill, the corporation can do so only if its estimated taxpayments exceed its revised estimate by at least 10 percent and the excess amounts to at least $500.

The provision for quick repayment which the bill contains is effective for taxable years beginning in 1968.

This provision for quick repayment is somewhat similar to the provision now available for "quickie" refunds resulting from net operating loss carrybacks or carrybacks of investment tax credits. This quick adjustment of an overpayment will make less burdensome the overpayments corporations now may be more likely to make because of the larger portion of their expected tax liability which they will have to pay on a current basis as a result of reducing the $100,000 exemption and raising the 70-percent test to 80 percent.

Under the bill, the adjustment application must be filed before the date a corporation first files its income tax return (whether or not it subsequently amends the return) or the date for filing its returns (determined without regard to any extension), whichever is earlier. The filing date for corporations is the 15th day of the third month following the close of their taxable year, or March 15 for calendar year taxpayers.

In order to discourage frivolous adjustment applications and applications from corporations which merely want to borrow funds from the Government, the bill imposes (in a new subsec. (g) of sec. 6655 of the code) an addition to tax at an annual rate of 6 percent on a corporation if it requests and receives an adjustment which subsequently is determined to be excessive. This 6-percent amount, as in the case of an underpayment of estimated tax, is not deductible for income tax purposes. The addition to tax is computed from the time of the excessive adjustment to the due date for the tax return (March 15 in the case of a calendar year taxpayer). (The normal interest for late payment at 6 percent applies thereafter.) The computation of this addition to tax is made independently of, and does not affect the computation of, any addition to tax which a corporation may otherwise owe for an underpayment of an installment of estimated tax.

On its application for adjustment, the corporation is to set forth the estimated tax which it paid during the year, the amount of its revised estimated tax liability, the amount of the adjustment which it requests, and such other information as the Secretary of the Treasury by regulations may prescribe. Before making an adjustment, the Internal Revenue Service may make a very limited examination of an adjustment application. The examination is not to prejudice any right of the Service to claim later that the adjustment was improper. The Service may disallow an application when it finds that the application contains material omissions or errors which the Service deems that it cannot correct within the 45-day period allowed it in making an adjustment. If the Service disallows the adjustment, it is expected that the Service will inform the taxpayer of this action. If it allows the adjustment, the Service may first credit the amount of a claimed adjustment against an outstanding tax liability of the corporation before making payment of the balance to the corporation. In this case it is understood that the Service will notify the corporation of the credit.

An adjustment is generally to be treated as a reduction of prior estimated taxpayments as of the date of the adjustment. However, for purposes of the provision relating to additions to tax for failure to pay estimated income tax (sec. 6655), the adjustment is to be ignored—that is, treated as if not made—in determining whether there has been any underpayment of estimated income tax and, if there is an underpayment, the period during which the underpayment existed.

7. *Timely mailing of tax deposits (sec. 4 of the bill and sec. 7502(e) of the code)*

Present law.—The Internal Revenue Service is placing increasing reliance of the deposit method for the collection of taxes and now is collecting about $80 billion a year in this manner. Presently most withheld income taxes, estimated corporate income taxes, and excise taxes are collected in this manner. About 90 percent of the banks in the country are designated as depositaries for this purpose. This allows most taxpayers to hand deliver deposits on the last day prescribed for deposit and avoid any addition to tax that would otherwise result.

Some taxpayers, however, find it more convenient to mail tax deposits than to hand deliver them. This may occur, for example, because a corporation with centralized financial management desires to make deposits with banks in the various communities in which its plants are located. Under the regulations, these deposits which are mailed are not considered as made until received by depositaries. The responsibility for timely mail delivery thus falls on the taxpayers. This differs from the general rule which treats payments as made when mailed.

Explanation of provisions.—Your committee's bill and the House bill provide that where a taxpayer mails his tax deposit 2 or more days before the prescribed due date, the mailing is to be considered a timely deposit even though the deposit is received after the due date (but only if it is actually received). Thus, under the bill, the Government, and not the taxpayer, bears the responsibility for timely mail delivery.

Under both versions of the bill, the mailing of a deposit 2 or more days before the due date for payment is to be considered as payment only where the taxpayer can establish that he timely mailed the deposit. In the case of a deposit sent by registered mail, the date of registration is to be deemed the date of mailing. The taxpayer, of course, could also establish the date of mailing by other competent evidence.

IV. CHANGES IN EXISTING LAW

In the opinion of the committee, it is necessary, in order to expedite the business of the Senate, to dispense with the requirements of subsection 4 of rule XXIX of the Standing Rules of the Senate (relating to the showing of changes in existing law made by the bill, as reported).

○

DRAFT

Jurisdiction

1. The Jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 2201 and Title 28, United States Code, Section 2202. Petitioner ______________- seeks the appropriate remedies allowed under 28 USC 2201 and 28 USC 2201 on the grounds that he ~~earnestly~~ believes the provisions of 90-248 Sec. 208 (b) as amended June 10, 1968 1by Title III of H. R. 15414, Sec. 301 to be unconstitutional; and further believes that provisions of said act would ~~to~~ bring a great hardship on co-petitioners and all ~~the~~ other persons similarly situated. __________________ ~~earnestly~~ believes that P.L. 90-248 Sec. 208 (b), as amended, is violative of the "due process" caluse of the Fifth Amendment; and that his implementation of that provision would force him to commit acts violative of the rights gauranteed to citizens by the "due process" and "equal protection" clauses of the Fourteenth Amendment. Not wishing to commit acts which he ~~earnestly~~ believes to be unconstitutional, and which would helped him to legal proceedings and possible damages(?) ____________ applies to this court for relief.

2. ____________________ ~~co~~petitioners in their own behalf and on behalf of all others similarly situated pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure, assert that the above mentioned statute constitutes a deprivation of rights gauranteed them by the "due process" clause of the Fifth Amendment, and the "due process" and "equal protection" caluses of the Fourteenth Amendment.

3. This is a proper case for determination by a three judge court pursuant to 28 US C Sec. 2281 since it seeks an injunction to restrain the Respondent from the enforcement,

operation and execution of P.L. 90-248 Sec. 208 (b), as amended, on the grounds that said provision is unconstitutional.

II

Petitioner

4. Petitioners are: 1)________________County Director of the Essex County, Department of Social Services (herein referred to as Director). ~~It~~ [illegible] is, and has been since ____________, his official duty to administer various forms of public assistance and welfare benefits, including the County and States plan for Aid to Families with Dependent Children, and particularly 90-248. This plan is provided in joint co-operation by Federal, State and County agencies.

5. 2) Petitioner____________________(herein after referred to as "recipient) residing at __________________in Essex County, State of New Jersey, is a person receiving benefits under the AFDC plan. (S)he represents approximately ______people similarly receiving benefits under AFDC.

III

Respondents

6. The Honorable Wilbur J. Cohen is Secretary of the United States Department of Health, Education and Welfare (herein after referred to as "HEW") and authorized to by law administer the AFDC Program to the States pursuant to 42 USC 601-609.

IV

IV

Statement of Facts

7. At the present time there is a federally supported ~~the~~ AFDC plan ~~is~~ being administered in Essex County, New Jersey. and petitioner is the administrator thereof ~~There are~~ approximately ____________ persons (are) receiving benefits in Essex' County under this plan. For the fiscal year beginning ____________ and ending ____________ the total cost of the program was __________. Of this amount ______% was deferred by Federal funds, ___% by State funds, and ___% by County funds. For the fiscal year beginning ______________ and ending ______________ it is expected that ____ persons would be eligible for assistance under AFDC under the present rules of eligibility. This would constitute an increase of _____% over the previous year. The projected cost of administering the program to all who would be eligible under the present rules would be $_______.

should we explain the

8. On December 15, 1967 the 90th Congress of the United States adopted certain amendments to Title IV of the Social Security Act, which upon being signed by the President on January 2, 1968 became Public Law 90-248 (81 8211) Section 208 (b) (hereinafter referred to as the "prog of this law provides as follows:

> (b) Section 403 of such act is further amended by adding at the end thereof the following new subsection:
>
> (d) Nothwithstanding any other provision of this Act, the average monthly number of dependent children

> under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such state under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this Section were made to such State for the calendar quarter beginning January 1, 1968 ?? bore to the total population of such state under the age of 18 on that date"

This provision was later amended to change the date at which it would become effective from July 1, 1968 to July 1, 1969. (65 ? ?)

99. If implemented as scheduled this provision in Essex County will bar the availability of federal funds, at the present level to each eligible individual, to ----------persons; or reduce the average amount of Federal funds going to each eligible person in Exxex County by $_______. These figures are derived by the following manner (cite ratio~~n~~ of 18,88 and under recipients to 18 ~~plus~~ and under non-recipients and the projected ratio in 1969. Presumably the ratio will not be the same, indicating an increase in the percentage of those eligible).

10. These figures indicate that on July 1, 1968, ______children and their adult supporters will be ineligible for Federal assistance under the AFDC plan. Since Federal funds make up ______% of AFDC grants in Exxex County these persons would only be receiving _______% of the yearly amount they would have been eligible for before the

"freeze". This ~~accounts~~ amounts to only $______ a month for a family of four. It goes without saying that this amount is not sufficient to provide even the most basic life necessities.

11. The alternative to barring federal funds to under AFDC ~~reducing the monthly grant~~ to those individuals who are in excess of the ratio of 18 and under dependent children on AFDC to those not on theAFDC plan on January 1, 1968 is to reduce across the board the monthly grant of all AFDC recipients. In the year 1969 this would result in a ____% cut in the monthly budget of an AFDC family of four ~~all AFDC recipients~~ which amounts to a reduction of $ ______ in the monthly budget of an AFDC family of four. This would leave an AFDC family $4 only $______ for their monthly budget, a figure clearly insufficient to live in health and dignity.

12. As neither the County of Essex nor the State of New Jersey can appropriate sufficient funds to make up the deficit in available funds for eligible AFDC recipients caused by the "freeze" these persons will be arbitrarily irrationally and capriciously denied a chance to live in health and dignity.

13. ~~Such-~~ By administering the "freeze" the Respondent, as a representative of the government of the United States, and as an individual, will be denying the Petitioning recipients due process of law granted them under the Fifth Amendment of the Constitution of the United State by denying them property to which they have a statutory right gauranteed by 42 U.S.C. 601-609.

14. The "freeze" if administered by the Respondent will either totally deny persons

we should set forth that $ — requires increasing the grants by the increase in cost of living since. ~~B~~ By reducing the grants

Federal money under AFDC even though they are in every other respect eligible, or the monthly grants of all AFDC revipients will have to be reduced across the board to a level which would render it impossible for them to live in health and dignity.

15. Such an arbitrary, irrational and capricious denial of a minimum living standard is clearly contrary to the provisions of 42 USC 601-609 and is thereby a denial of due process guaranteed by the Fifth Amendment.

16. Petitioning recipients further assert that if the "freeze" is given effect their rights to due process will be denied as guaranteed by the Fourteenth Amendment of the Constitution of the United States. As the AFDC plan is jointly administered by Federal, State and County agencies, property to which they have a statutory right will be denied by the State and County agencies in concert with Respondent. This denial of property to which they have a statutory right will be denied in a purely irrational, arbitrary, and capricious manner, violative of due process under the Fourteenth Amendment.

17. Finally petitioning recipients assert that if Respondent administers the "freeze" their right to equal protection gauranteed by the Fourteenth Amendment will be violated. Those persons in excess of the ratio of 18 and under AFDC recipients to the non-recipient 18 and under population as of January 1, 1968 will be denied Federal funds under the AFDC plan though they are in every othrr respect eligible for such assistance.

18 (Would equal protection rights be affected if an across the board cut were instituted?)

19. Because petitioning recipients will be undonstitutionally denied property without due process, and unconstitutionally denied equal protection by the implementation of the "freeze" by the Respondent -- the petitioneng recipients and all others similarly situated assert that they have a valid, timely and personal interest in this courtroom, controversy that their interests are imminently affected by the "freeze", that they will suffer irreparable damage by its implementation, and that they therefore have proper standing to challenge the constitutionality of the Respondent's implementation of it

20. Petitioning Director asserts that the "freeze" is violative of the Fifth Amendment for the same reasons as mentioned in paragraphs 13, 14, and 15.

21. Petitioning Director further asserts that the "freeze" is violative of rights guaranteed under the "due process" and "equal protection" clauses of the Fourteenth Amendment for the same reasons as mentioned in paragraphs 16, 17 and 18.

22. Petitioning Director finally asserts that his personal interest in the controversy arises from the fact that the "freeze" would require him in his official capacity to perform acts which are unconstitutional for the above mentioned reasons.

23. Not desiring to perform acts which are contrary to the United States Constitution and not wanting to be partially instrumental in causing permanent and irreparable injury to co-petitioners and countless thousands similarly situated -- Petitioner, Director, asserts he has a valid, timely, and personal interest in this controversy, and that because of his interest in this matter and the ~~immensity~~ imminence of the "freeze" he has proper standing to challenge the constitutionality of the Respondent's implementation of it.

Wherefore Petitioner Director and Petitioner Recipients on behalf of themselves and all others similarly situated jointly and separately respectfully pray:

(1) That a three-judge Court be convened to determine the controvergy pursuant to 28 USC, Sec. 2281.

(2) That this Court enter a declaratory judgement pursuant to 28 USC 2201 declaring that P.L. 90-248 Section 208 (b) of the "freeze" is void and of no effect insofar as it violates rights guaranteed citizens by the Fifth and Fourteenth Amendments of the constitution of the United States for the above stated reasons.

(s) That the Court issue a permanent injunction pursuant to 28 USC 2202 restraining Respondent from giving force and effect to P.L. 90-248 Section 208 (b) on the grounds that it is unconstitutional for the above stated reasons.

(4) That pending the determination of the prayer for permanent injunction this Court issue a preliminary injunction restraining the Respondent from giving force and effect to P.L. 90-248 Section 208 (b).

(5) That pending determination of the prayer for a preliminary injunction this Court issue, after notice to the Respondent, an order temporarily restraining him from giving force and effect to P.L. 90-248 Section 208 (b).

(6) That this Court enter such other, further, and alternative orders and relief as the Court may deem just and proper.

Problems areas in the Draft of the Complaint

1) Should #s 1+2 be consolidated and is it proper to allege hardship in the complaint?

2) Should allegation that this complaint be reviewed by a 3 judge court be ~~instituted~~ included in the allegation of jurisdiction, the prayer for relief, or both?

3) In # 4 is it proper to say that Essex County Director is the ultimate administrator of AFDC? or is the plan properly ~~seen as~~ officially administered by the State? If officially the state administers the plan I should think that the State Director should be named as a co-defendant. However, I realize that this ~~is~~ is probably unfeasable.

4) In #s 9+10 is it at all proper to state that recipients will be ineligible for Fed. AFDC if the Freeze takes effect. The Freeze simply states that no ~~more~~ additional funds will be available ~~than would~~ if ratio of recipients to non-recipients in population exceeds that same ratio as it was in Jan 1, 1968. ~~This~~ Whether this would mean the exclusion of certain people from eligibility is not a matter for the Secretary. How the funds that are available will be distributed is a matter of state policy. The State would not have to exclude ~~anyone~~ anybody. They simply would have to make across board cuts in order to distribute Fed. funds to all eligible

persons.

5) In ¶ 12 – is the assumption that the County + State cannot make up the possible losses caused by the "freeze" true? What does the County + State plan to do if the Freeze comes into effect?

6. In ¶ 13 should the Respondent be ~~s to~~ referred to as a "representative of the US?" Do we want to allege ~~the~~ that his actions qua individual are unconstitutional or only his acts qua Secretary of HEW are?

7) Again, in ¶ 14 ~~this~~ does it follow at all that some people ~~to~~ will, by operation of the "freeze," be denied Fed. money?

8) ¶ 16 – It seems to me that the whole 14th Am. argument is weak. The "Freeze" is simply an appropriations bill. If less money is made available to the state by an act of Congress can you really allege that the state is denying a citizen of ~~the~~ rights, privileges, or immunities without due process? The 14th Am. applies to state acts. Is the state doing anything wrong if the Freeze comes into effect? Can you, as I argue in ¶ 16, say that since AFDC is somehow a joint plan between Fed, State, + County Agencies, that the State is somehow implicated in the denial of rights?

Key

9) Is there any equal protection issue involved at all if across the board cuts are instituted?

10.) In ¶ 19 I feel that it is important to make some sort of argument that petitioners have standing, or a a personal interest, but I'm not sure that the best way to do it is to simply allege the fact. The same consideration applies to ¶ 23

11) in ¶s 20 + 21 should I spell out argument or is it OK to refer to those arguments by mentioning the other ¶s?

12) In ¶ 22 is it true that the County Director would actually be performing unconstitutional acts even if the freeze were unconstitutional? If there is anything unconstitutional at all could the County Director be sued complicity? i.e. could he be named as a defendant by the recipients? This seems to me to be the proper test to determine if he has standing.

1. This is a suit for injunctive relief authorized by Title 42 USC Sec. 1983 to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of the state of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, by the Social Security Act, 42 USC Secs. 601-609, and by Sec. 601 of the Civil Rights Act of 1964. This is also a suit for a declaratory judgment pursuant to Title 28 USC Sec. 2201 of rights established by the aforementioned constitutional and statutory provisions.

2. This is a proper case for determination by a three-judge court pursuant to 28 USC Sec. 2281 since it seeks an injunction to restrain the Defendant officers of the State of South Carolina from the enforcement, operation and execution of the state-wide regulation set forth in the Policies and Procedures in Public Assistance, of the South Carolina Department of Public Welfare (hereafter referred to as "The Manual"), Volume IV, Chapter 2, Sec. C, 2, d., (1), (d) (hereafter referred to as the "Common-law Relationship" regulation), on the ground of the unconstitutionality of said regulation under the Constitution of the United States, further, on the ground that the statute on its face is a violation of the Social Security Act, 42 USC Sec. 601-609, and further on the ground that the statute as applied is

a violation of Section 601 of the Civ [illegible] ts Act [illegible]

3. Jurisdiction is cor [illegible] is [illegible] (3) and (4) providing for orig [illegible] ion [illegible] suits authorized by 42 USC Sec [illegible] ct [illegible] conferred on this Court by 28 [illegible] and [illegible] declaratory judgments and by 28 [illegible] ar [illegible] a three-judge Court.

4. Plaintiffs have been den [illegible] tan [illegible] citizens of South Carolina under the Code [illegible] ws o [illegible] Sec. 71-11, and Title 42 USC Secs. 601-609, [illegible] he basis of [illegible] South Carolina "common law relationship" regulation.

5. Plaintiffs bring this action on their behalf and on behalf of all the other persons similarly situated pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. The members of the class similarly situated are needy mothers and dependent children in the State of South Carolina otherwise eligible for Aid to Dependent Children payments whose financial assistance has been terminated or denied on the ground of the aforementioned "common-law relationship" regulation. The members of this class are so numerous as to make joinder impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties fairly and adequately protect the interests of the class; and the State of South Carolina has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

6. Defendants make up the South Carolina Board of Public Welfare under which the State Department of Public Welfare operates, Code of Laws of South Carolina Sec. 71-1, and which appoints the State Director of Public Welfare who executes the decisions and carries out the policies of the Board and who sees that the laws relating to the activities and responsibilities of the Board are obeyed, and who is the administrative head of the State Department of Public Welfare, Code of Laws of South Carolina Sec. 71-5. The State Department of Public Welfare is authorized to:

> (1) Supervise and administer the public welfare activities and functions of the state, and
>
> (2) adopt all necessary rules and regulations and formulate policies and methods of administration, when not otherwise fixed by law.

The State Department of Public Welfare has published the manual which contains the "common-law relationship" regulation. Defendants make up the County Board of Public Welfare which acts as the representative of the State in administering welfare activities within County. CLSC Sec. 71-36.

Defendant is the County Director of County's public assistance program and is the chief executive office of the county organization performing those duties assigend to him by the county board the State Department, or law. CLSC Sec. 71-34.

7. Under the Code of Laws of South Carolina Sec. 71-99, the County Department is directed to grant aid to the families in South Carolina with "dependant children."

8. The Code of Laws of South Carolina Sec. 71-91 defines "dependent child" as one under the age of eighteen years who has been deprived of parental support or care by reason of the death, continued absence from home or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or neice in a place of residence maintained by one or more of such relatives at his or their own home and who, if not granted aid, is likely to become a public charge or who would otherwise be deprived of proper support, care or training or a child under the age of twenty-one who is attending high school or college or regularly attending a course of vocational or technical training.

9. In all respects, but for the "common-law relationship" regulation promulgated and enforced by Defendants, Plaintiffs, and the other members of their class, qualify for and are entitled to benefits under the South Carolina Aid to Dependent Children program:

(a) one legal parent is absent from the home.

(b) the children are in the home of a relative included in the statute

(c) all children are under 18 or are in school and under 21

(d) all have lived in the state for over a year, or have been born within a year to one who has lived in the state for over a year.

(e) the income of the relative with whom they are living is below the minimum standard promulgated by Defendants as being necessary for a subsistence compatible with decency and health

10a. The "common-law relationship" regulation by which Plaintiffs are denied assistance is included in The Manual among the definitions of persons who are considered "parents" for the purposes of determining welfare eligibility:

> "(a) The legal father or mother; i.e., the parents are legally married, including recognized common-law marriage; and adoptive parents ....
>
> (b) A man who is living in common-law relationship with a woman and residing in the home with her, whether or not they are legally married by license. (The common-law relationship would set up a step-parent relationship with children not his own.)"

Manual, Vol. IV, Ch. 2, Sec. C, 2, d., (1) (a) and (d). Definition of a Parent, p. 39.

10b. The manual further explains that the State Department of

Public Welfare has, by regulation, "adopted the policy of considering a man and woman who are living together as having established a common-law relationship and the man has the same responsibility for her and her children as though he were the legal husband." Manual, Vol. IV, Ch. 2, Sec. C, 2, d., (2), (b), Common-Law Relationship, p. 44. That is, Defendants have promulgated and enforced the statewide regulation that, for the purposes of welfare eligibility, cohabitation is to be considered common-law marriage, and therefore is to place a duty on the male cohabitor to support the woman and her children as if he were the legal husband and father.

11. South Carolina statutes define the situations in which there is a legally enforceable duty to support the following:

(a) Any man who is capable of working is obliged to support his wife, his minor unmarried legitimate or illegitimate child or children dependant on him for support. Code of Laws of South Carolina, Sec. 20-303.

(b) The step-parent of a child is obliged to support that child provided that he knew that the child existed at the time of his marriage. Code of Laws of South Carolina, Sec. 15-1231.

In either case, the law demands a legal marriage before it will require support of the children who are not the natural or legally adoptive children of the man.

12. South Carolina recognized common-law marriage, but places limitations on its formation:

(a) Parties to any marriage must be legally free to contract marriage, otherwise the marriage is bigamous and void. Code of Laws of South Carolina, Sec. 20-6

(b) Parties who have allegedly entered into a common-law marriage must have the intention of living as man and wife before the law will recognize their marriage and give it will legal effect. Tedder v. Tedder, 108 S.C. 271, 94 S.E. 19 (1917).

13. South Carolina law places the burden on the party alleging the common-law marriage to prove its existence by a preponderance of the testimony. Ex parte Blizzard, 185 S.C. 131, 193 S.E. 633 (1937), citing Pooler v. Smith, 73 S.C. 102, 52 S.E. 967 (1905).

14. According to information given to Plaintiff by of the State Department of Public Welfare, the common-law relationship which makes her and her children ineligible for assistance under the South Carolina Aid to Dependent Children Program involves herself and one . Plaintiff was told that she and her children were to look to Mr. for support, on the basis of the "common-law relationship" with him. None of her children are the natural or adoptive children of Mr. .

15. Mr. . is not legally liable for the support of Plaintiff because he and Plaintiff have not agreed to be, and do not intend to be, living as man and wife. He is legally married to and has _____natural children by that marriage, and is not capable of

contracting any legally valid marriage in South Carolina.

16. In King v. Smith, No. 949, 36 U.S.L.W. 4703 (June 17, 1968), the Supreme Court of the United States construed 42 U.S.C. Sec. 606 to include in its definition of "parent" only those persons legally liable for the care and support of the child.

17. The Aid to Dependent Children programs of all states must conform to the terms of the federal statutes defining the scope of the federal social security program if those states are to receive federal support for their programs 42 U.S.C. 601-609.

18. Federal funds under 42 U.S.C. 601 et seq. make up a major share of Aid to Dependent Children payments in South Carolina, and so, by the terms of the federal statute, South Carolina is bound by the authoritative interpretation of that statute by the United States Supreme Court.

19. Upon information and belief, the Defendants have applied their "common-law relationship" regulation so as to disqualify from Aid-to Dependent Children benefits only or virtually only Negro mothers and children and not white mothers and children.

20. By promulgating, adopting and enforcing the "common-law relationship" regulation, and on ground of said regulation terminating and denying Aid to Dependent Children financial assistance to Plaintiffs and all other members of their class, Defendants, acting under the color of State Law, have unlawfully deprived Plaintiffs and the other members of her class of their Constitutional right to due process and the equal

protection of the laws of South Carolina, contrary to the provisions of 42 U.S.C. Sec. 1983, further Defendants have deprived Plaintiffs, and the other members of their class, of Aid to Dependent Children benefits in violation of their rights under the Federal Social Security Act, as amended, 42 U.S.C. 601-609, and of their right to be free from racial discrimination in the determination of their eligibility for participation in a federally assisted program, as guaranteed by Sec. 601 of the Civil Rights Act of 1964, in the following manner:

A. Defendants have deprived Plaintiffs, and all others similarly situated, of due process of lay by denying them property to which they have a statutory right by arbitrarily assigning them to a status for which, according to South Carolina Law, they do not qualify

B. Defendants have deprived Plaintiffs, and all others similarly situated of due process of law by placing the burden on them to prove that they have not entered into common-law marriages, despite their assertions that they do not intend, and have never intended, to live as man and wife, or that they are not free to contract marriage, when no compelling proof of common-law marriage was presented prior to their being denied admission to or being removed from the role of those receiving Aid to Dependant Children benefits.

C. Defendants have deprived Plaintiff's needy and dependent children, and the needy and dependent children of all others similarly situated, of the equal protection of the law by arbitrarily and irrationally classifying them as ineligible for Aid to Dependent Children benefits on the ground of their mother's relationship with a man, which relationship places no legal liability for their support on said man, and leaves them deprived of the support of one parent, which deprivation is statutorily the basis of eligibility for Aid to Dependent Children benefits.

D. Defendants have deprived Plaintiffs and all others similarly situated, of the equal protection of the law by promulgating and enforcing a regulation which creates a second definition of common-law marriage in South Carolina, this definition to be applicable only to welfare recipients; while the prior court-made definition remains applicable to all others. The basis for this distinctive classification is not related to any legitimate govermental purpose.

E. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of their rights, and of property to which they have a right, under the federal statutes defining the Aid to Dependent Children Program, 42 U.S.C. 601 et seq., as those statutes were authoritatively construed by the United States Supreme Court in the case of King v. Smith, No. 949, 36 U.S.L.W. 4703 (June 17, 1968) by construing the term "parent" to include one involved in a "common-law relationship" with the woman who is an applicant for, or recipient of, Aid to Dependent Children benefits.

F. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of the equal protection of the laws by applying the "common-law relationship" regulation in such a manner as to disqualify Negro applicants and recipients but not white applicants and recipients.

G. Defendants have deprived Plaintiffs and their needy and dependent children, and all others similarly situated, of their right to be free from racial discrimination in the determination of their eligibility for participation in a federally assisted program in violation of Sec. 601 of the Civil Rights Act of 1964.

20. Plaintiffs and the class which they represent have suffered damage to their health and well-being, the health and well-being of their children, and damage to their family life, and will continue to suffer severe and irreparable injury because of the aforesaid regulation complained herein until said regulation is declared unconstitutional and illegal and is enjoined by this Court. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

Wherefore, plaintiffs on behalf of themselves and all others similarly situated respectfully pray:

(1) That a three-judge Court be convened

to determine this controversy pursuant to 28 U.S.C. Sec. 2281

(2) That this Court enter a declaratory judgment pursuant to 28 U.S.C. Sec. 2201 declaring the "common-law relationship" regulation of the South Carolina Department of Public Welfare, as contained in Vol. IV, Ch. 2, Sec. C, 2, d., (1), (d) of The Manual of that Department, void and of no effect insofar as it denies eligibility to Plaintiff, her needy and dependent children and all others similarly situated on the ground that a "common-law relationship creates a duty of parental support in the party to that relationship who has no other connection to the children or to the relative with whom they are living, their remaining natural parent; and further declaring that said regulation is repugnant to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States; and further declaring that said regulation is contrary to the authoritative interpretation of the Social Security Act, 42 U.S.C. Secs. 601-609, as handed down by the United States Supreme Court in King v. Smith, supra; and further declaring that said regulation applied to disqualify only, or nearly only, Negro applicants and recipients of Aid to Dependent Children benefits is a violation of Sec. 601 of the Civil Rights Act of 1964 in

that it is a means of racially discriminating in the determination of eligibility for participation in a federally assisted program; and further declaring that Defendants are required to consider the eligibility for Aid to Dependent Children of Plaintiffs and all others similarly situated without reference to said "common-law relationship" regulation.

(3) That this Court enter a permanent injunction restraining each defendant, their successors in office, agents and employees from enforcing the "common-law relationship" regulation contained in Volume IV, Chapter 2, Section C, 2, d., (1), (d) of the Manual of the South Carolina Department of Public Welfare and order them to consider the eligibility of Plaintiffs, etc. for Aid to Dependent Children benefits .

(4) That pending the determination of the prayer for permanent injunction this Court issue a preliminary injunction, restraining each defendant, their successors in office, agents and employees from enforcing the "common-law relationship" regulation of the South Carolina Department of Public Welfare, and ordering them to consider eligibility for Aid to Dependent Children of Plaintiff and her needy and dependent children and all others similarly situated without regard to

said regulation, and generally from doing any act or thing to carry out or enforce said "common-law relationship" regulation.

(5) That pending determination of the prayer for a preliminary injunction, this Court issue, after notice to defendants, an order temporarily restraining each defendant, their successors in office, agents and employees from enforcing the "common-law relationship" regulation of the South Carolina Department of Public Welfare, and ordering them to consider eligibility for Aid to Dependent Children of Plaintiff and her needy and dependent children and all others similarly situated without regard to said regulation, and generally from doing any act or thing to carry out or enforce said "common-law relationship" regulation.

(6) For such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y. August 29, 1968

Attorney for Plaintiff

~~First~~

Petitioner, Director, further asserts that he is entitled to a declaratory judgement to establish his duties ~~in light~~ under the 1967 Amendments to Social Security Act, ~~as amended by~~

Since the reduced federal funding under section 208(b) will ~~is~~ force a reduction of the grants of all AFDC mothers and children as a means of meeting the financial problems caused thereby and thereby flout

Petitioner ~~further~~ asserts that he is entitled to a declaratory judgement on the following grounds:

~~The 1967 Amendments to the Social Security Act (incorporated into the Act as~~

~~Section 402(a)(23) of the Social Security Act~~

~~Section~~

¶ Indent

P.L. 90-248 section 213(b), ~~the~~ the same Act which created the "freeze," ~~[illegible]~~ and which amends section 402(a) of the Social Security Act, provides that, INDENT "by July 1, 1969, the amounts used by the State to determine the needs of individual will have been adjusted to reflect fully changes in living costs since such amounts were established, and

①

United Sates District Court

______ District of ______

The County of Essex, State of New Jersey,
acting by and through ______,
Director ~~and~~ of Essex County Department
of Social Services, and ______, a
Recipient of Public Assistance and all
others Similarly Situatided.

Petitioners

—VS:—

The Honorable Wilbur J. Cohen,
Secretary, United States Department
of Health, Education, and Welfare.

Respondent

Case No. ______

Petition Requesting a Declaratory judgement that Public Law 90-248 section 208 (b) as amended June 10, 1968 by Tittle III of H. R. 15414, Section 301, be Declaired Unconstitutional and that the Court Permanently Enjoin Respondent from Enforcing Such Provision.

23 (a)(3)

②

I

Jurisdiction

1. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 2201, and Title 28, United States Code, Section 2202. Petitioner ________ seeks the appropriate remedies allowed under 28 USC 2201 and 28 USC 2202 on the grounds that he earnestly believes the provisions of 90-248 § 208(b), as amended June 10, 1968 by Title III of H.R. 15414, § 301, to be unconstitutional and to bring a great hardships on co-petitioners and all the persons ~~simil~~ similarly situated. ~~________ co-petitioners and in behalf of all other persons similarly situated, assert that the above mentioned statutes constitute a violation deprivation of rights gauranteed to them and all others similarly situated, by the "due process" clause of the Fifth Amendment and "equal protection" clause of the Fourteenth Amendment.~~

________ earnestly believes that P.L. 90-248 § 208(b), as amendeded, ~~constitutes a~~ is violative of the "due process" clause of the Fifth Amendment, and that his implementation of that provision would force him to committ acts violative of the rights gauranteed to citizens by the "due process" and "equal protection" clauses of the Fourteenth Amendment. Not wishing to committ acts which he earnestly believes to be unconstitutional ________ applies to this Court for ~~pro~~ relief.

2. ________ co-petitioners ~~as~~ in their own behalf and on behalf of all others similarly situated pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Proceedure, assert that the above mentioned statute constitutes a deprivation of rights gauranteed ~~to citizens~~ them by the "due process" ~~and "equal protection"~~ clauses of the Fifth Amendment, and the "due process" and "equal protection" clauses of the ~~Fourt~~ Fourteenth Amendment.

~~ith.~~ 3. This is a proper case for determination by a three judge court pursuant to 28 USC Sec. 2281 since it seeks an injunction to restrain the Respondent from the enforcement, operation and execution of P.L. 90-248 Sec. 208 (b), as amended, on the grounds that said provision is ~~unconstitutional void~~ unconstitutional.

II

Petitioner

4. Petitioners are: 1) ______ County Director of the Essex County Department of Social Services (herein referred to as Director) ~~that~~ is and has been since ______ ~~charged with the duty of administering~~ ~~two faith~~ his official duty to administer various forms of public assistance and welfare benefits, including the ~~State~~ County and State's plan for Aid to Families with Dependent Children (hereinafter "AFDC"). This plan is provided in joint co-operation ~~among~~ by Federal, State and County agencies.

~~Ed~~ ~~III~~

~~Respondent~~

~~5) The Honorable Wilbur J. Cohen is Secretary of the~~

5. Petitioner ______, (hereinafter "recipient") ~~is~~ residing at ______ ~~is a person~~ in Essex County, State of New Jersey, is a person recieving benefits ~~to the A~~ under the AFDC plan. (S)he represents approximately (#) people similarly recieving benefits under AFDC.

III

Respondents

6. The Honorable Wilbur J. Cohen is Secretary of the United States Department of Health, Education and Welfare (hereinafter "HEW") and authorized to administer the AFDC Program to the States pursuant to 42 USC 601-609.

IV

Statement of Facts

7. At the present time the AFDC plan ~~program~~ is being administered in Essex County, New Jersey. There are approximately ____ ~~of~~ persons recieving benefits in Essex county under this plan. For the fiscal year beginning ____ and ending ____ the cost of the program was ____. Of this amount ____% was defrayed by Federal funds, ____% by State funds, and ____% by County ~~%~~ funds. For the fiscal year beginning ____ and ending ____ it is expected that ____ persons would be eligible for assistance under AFDC under the present rules of eligibility. ~~The cost of projected cost of administering~~ This would constitute an increase of ____% over ~~this past year~~ the previous year. The projected cost of administering the program to all who would be eligible under the present rules would be $____.

8. On December 15, 1967, the 90th Congress of the United States adopted certain amendments to Title IV of the Social Security Act, which upon being signed ~~a~~ by the President on January 2 1968 became ~~a~~ Public Law 90-248 (81 Stat. 821). Section 208(b) of this law provides as follows:

"(b) Section 403 of such Act is further amended by adding at the end thereof the following new

③

subsection:

4 "(d) Notwithstanding any other provision of this Act, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a state for any quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such state under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such state under the age of 18 on that date."

~~8. The the date~~ This provision was later amended to change the date at which it would become effective from July 1, 1968 to July 1, 1969. (Give cite)

9. If implemented as scheduled this provision in Example will bar ~~from Federal funds~~ the availability of Federal funds, ~~of~~ at the present ~~amount~~ ~~present~~ level to each eligible individual, to ______ persons; or reduce the ~~sum~~ average amount of Federal funds going to each eligible person in Example by $______. These figures are derived by the following manner: (cite ~~of the proposed~~ ratio of 18 + under recipients to

to 18 + under non recipient and the projected ratio in 1969. Presumably ~~these~~ ratio will not be the same, ~~the~~ indicating an increase in the ~~%~~ percentage of those eligible.)

10. These figures indicate that on July 1, 1968 ______ children and their adult supporters will be ineligible for Federal assistance under the AFDC ~~program~~ plan. Since Federal ~~money~~ funds make up ______% of AFDC grants in Essex County these persons would only be recieving ______% of the yearly amount they would have been eligible for before the "freeze." This amounts to ~~one~~ only $ a month for a family of four. It goes without saying that this amount is not sufficient to provide even the most ~~essential~~ basic life necessities.

11. The ~~the~~ alternative to reducing the monthly grant to those individuals who are in excess of the ~~proportion~~ ratio of 18 and under dependent children on AFDC to those not on the AFDC plan on January 1, 1968 is to reduce ~~the~~ across the board the ~~of~~ monthly grant of all AFDC recipients. In the year of 1969 this would result in a ______% cut in the monthly budget of all AFDC recipients, which amounts to a reduction of $ ~~a month~~ in the monthly budget of an AFDC family of four. This would leave an AFDC family ~~the~~ only $______ for their monthly budget, a figure clearly insufficient to live in health and dignity.

12. As neither the County of Essex nor the State of New Jersey can appropriate sufficient funds to make up the deficit in available funds for eligible AFDC recipients caused by the "freeze" these persons will be ~~deprived of the chance to live in~~ arbitrarily ~~and to~~ irrationally and capriciously denied ~~of a~~ a chance to live in health and dignity.

(7)

~~III~~

~~Argument~~

13. ~~As a result of the "freze"~~ By administering the "freze" the Respondent, as a representative of the government of the United States, and as an individual, will be denying the Petitioning recipients ~~of property of~~ due process of law granted them under the ~~[illegible]~~ fifth amendment of the Constitution of the United States by denying them property to which they have a statutory right ~~as~~ gauranteed by 42 USC. 601-609.

14. The "freze" if administered by the Respondent will either totally deny persons ~~to~~ Federal money under AFDC eventhough they are in every other respect eligible, or the monthly grants of all AFDC recipients will have to be reduced across the board to a level ~~below a living~~ ~~st~~ which would render it impossible for them to live in health and dignity.

15. Such an arbitrary, irrational, and capricious denial of a ~~mere~~ minimum living standard is clearly contrary to the provisions of 42 USC 601-609 and is thereby a denial of due process gauranteed by the Fifth Amendment

16. Petitioning recipients further assert that if the "freze" is given effect ~~administered to~~ their ~~legal~~ rights to due process ~~and equal protection~~ will be denied as gauranteed by the fourteents amendment of the constitution of the United States. As the AFDC plan is jointly administered by ~~the~~ Federal, state, and County agencies ~~their rights~~ ~~to~~ property to which they have a statutory right will be denied by the state and County agencies in concert with Respondent. This denial of property to which they have a statutory right will be denied in a purely irrational, arbitrary, and capricious manner ~~to~~ violative of due process under the Fourteenth Amendment.

8

17. Finally petitioning recipients assert that ~~th~~ if Respondent administers the "freeze" their right to equal protection, gauranteed by the Fourteenth Amendment will be violated. Those persons in excess of the ratio of 18 and under ~~[illegible]~~ AFDC recipients to the non recipients 18 and under population as of January 1, 1968 will be denied ~~[illegible]~~ Federal Funds under the the AFDC plan though they are in every other respect eligible for such ~~[illegible]~~ assistance.

~~18 Furthermore, if the "freeze" is administered to by the respondent~~

18. Would equal protection rights be affected if an across the board cut were instituted?

19. Because petitioning recipients ~~would~~ will be unconstitutionally denied property without due process, and unconstitutionally denied equal protection by the implementation of the "freeze" by the Respondent — the petitioning recipients and all others similarly situated assert that they have a valid, timely, and personal interest in this controversy: that ~~they~~ their interests are imminently affected by the freeze; and that they, therefore, have proper standing to challenge the ~~respondents' [illegible]~~ constitutionality implementation of it.

(specificity?) of the Respondents

20 Petitioning director asserts that the "freeze" is violative of the Fifth Amendment for the same reasons as mentioned in paragraphs 13, 14 and 15.

21. Petitioning director further asserts that the "freeze" is violative of rights gauranteed under "due process" and "equal protection" clauses of the Fourteenth Amendment for the same reasons as mentioned in paragraphs 16, 17, and 18.

22 Petitioning director finally asserts that his personal interest in this controversy arises from the fact that ~~[illegible]~~ the "freeze" would require him in his official capacity to perform ~~acts~~ acts which are unconstitutional ~~for~~ for the above mentioned reasons.

23. Not desiring to perform acts which are contrary to the United State Constitution, and not wanting to be partially instrumental in causing permanent and irreparable injury to co-petitioners and countless thousands similarly situated — Petitioner, Director,

asserts he has a valid, timely, and personal interest in this controversy, and that because of his interest in this matter and the immenence of the "freeze" he has proper standing to challenge the constitutionality of the Respondents implementation of it.

Wherefore Petitioners Director and Petitioners Recipients on ~~their own~~ behalf of themselves and all others similarly situated jointly and separately respectfully pray:

(1) That a three-judge Court be convened to determine this controversy pursuant to 28 USC Sec. 2281.

(2) That this Court enter a declaratory judgement pursuant to 28 USC 2201 declaring that P.L. 90-248 Section 208(b) the "freeze", is void and of no effect ~~in so~~ insofar as it violates rights gauranteed citizens by the Fifth and Fourteenth Amendments of the Constitution of the United States for the above stated reasons.

(3) That this Court issue a permanent injunction ~~restraining [illegible]~~ pursuant to 28 USC 2202 restraining Respondent from giving force and effect to P.L. 90-248 Section 208(b) on the grounds that it is unconstitutional for the ~~reasons~~ above stated reasons.

(4) That pending the determination of the prayer for permanent injunction this Court issue a preliminary injunction, restraining the Respondent from giving force and effect to P.L. 90-248 Section 208(b).

(5) That pending determination of the prayer for a

preliminary injunction, this Court issue, after notice to the Respondent, an order temporarily restraining him from giving force and effect to P.L. 90-248 section 208(b).

~~(c) For such~~ other
(c) That the Court enter such other, further, and alternative orders and relief as the Court may deem ~~equitable~~ just and proper.

6. At the present time the AFDC plan is being administered in Essex County, New Jersey. ~~There are approximately ___ persons receiving benefits in Essex County.~~ There are approximately ___ persons recieving benefits in the State of New Jersey under this plan. ___ persons ~~under the~~ this ~~in~~ figure are 18, and under, dependent children, as defined by statute; this number represents -/- of the 18, and under, population of the State. There are approximately ___ persons recieving benefits in ~~the County of Essex~~, Essex County, New Jersey, under the AFDC plan. ___ persons in this figure are 18, and under, dependent children, as defined by statute; this number represents -/- of the 18, and under population of the county.

7. For the fiscal year beginning ___ and ending ___ the cost of the ~~program~~ state program was $___. Of this amount ___ %, $___, was deffered by federal funds; ___ %, $___, by State funds and ___ %, $___, by County funds. For the same period the cost of the County program was $___. Of this amount ___ %, $___, was deffered by federal funds; ___ %, $___, ~~was~~ by State funds; and ___ %, $___, by County funds.

State for COUNTY

9) omit (
10) include)

10. In the County of Essex, New Jersey the ratio of 18, and under, recipients to the total 18, and under, population ~~[illegible]~~ on Jan 1, 1968, was -/-. ~~[illegible]~~ On ~~Jan 1, 1969~~ July 1, 1969, the effective date of the ~~provision~~ "freeze", it is expected that the ratio of 18 and under ~~the~~ children eligible for AFDC to the total 18 and under population will be -/-. This indicates that approximately ___ children ~~[illegible]~~ who would ~~previously~~ ~~[illegible] previously been~~ have been previously eligible for AFDC will be ineligible if the ~~provision~~ "freeze" is allowed to stand.* (This assumes that the state in distributing federal funds to the counties would use the same ratio-rule as ~~the federal~~ HEW applies to the States. As Essex County has ___ % of ~~the~~ all the recipients of AFDC in the state;

than any other county

and as Essex County is expected to have a higher increase in the ~~18 and under~~ ratio of 18 and under eligible children to the total 18 and under population, this paragraph ~~states the~~ reflects the most conservative figures in estimating the number of children [illegible] adversely affected by the "freeze." In actual fact, the number adversely affected may be much higher.)

$ or the amount of the average budget going to a family of four would have to be reduced by —%, or $—.

1) actual controversy
2) adverse effect (alleged rights.
3) standing
4) not hypothetical, moot or political
5) interest in controversy

"If the ultimate impact of the challenged action on the petitioner is sufficiently probable and not too distant, and if the procedure by which that ultimate action may be questioned is too onerous or hazardous, 'standing' is given to challenge the action at a preliminary stage."

Frankfurter - concurring opinion in *Anti-Fascist Refugee* Committee v. *McGrath* (1951) 341 US 123, 71 S. Ct. 624, 95 L.ed 817 allege injury to π by statute in order to challenge statute's constitutionality

United States District Court
______ District of ______
(Title of Action)

See form 257
in "Bender's Forms"

Civil Action No. ______
Complaint

(Allegation of Jurisdiction)

1. The action arises under the Constitution of the United States, Article ______, Sec. ______; [the ______ Amendment to the Const. of the U.S., Section ______]; [the Act of ______, ______ Stat. ______; ______ USC; Title ______, § ______;]

This is a suit for declaratory judgement and injunctive relief.

Deadline [action to declare freeze unconst
& declar. judg. ~~A~~ define rights

Essex County Dept. of Welfare

- 74% of county wide caseload in Central ward.
- possible danger back pay 3 mnth. & Pkg
- wants permanent & temp injunction
- HEW response re-allocate money.
- but since Congress wants cost of living increase = can't reallocate
- possible intervention as party intervenor.

- Xerox set of papers
-

Whereas Georgia would establish waiting list, N.J. wants merely to proceed as previously

---

- Notes from Spain
- file of Nagler
- ~~interviews~~ interviews

S
46

SEDFRE

FARMER, JAMES ET AL VS. MOSES, ROBERT AND N.Y. WORLD'S FAIR 1964-1965 CORPORATION

Box 36
Folder 24

State Historical Society of Wisconsin

Please Retain Original Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C O P Y

- - - - - - - - - - - - - - - - - - - x

JAMES FARMER, EUGENE T. REED, REV. GARDNER TAYLOR and REV. ROBERT J. STONE on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

ROBERT MOSES, President of New York World's Fair 1964-1965 Corporation, and NEW YORK WORLD"S FAIR 1964-1965 CORPORATION, a New York Corporation,

Defendants.

- - - - - - - - - - - - - - - - - - - x

OPINION

64 Civ. 1666

(U. S. DISTRICT COURT
Filed
JUN 30 1964
S. D. OF N. Y.)

HOWARD M. SQUADRON, ESQ., CARL RACHLIN, ESQ. JACK GREENBERG, ESQ., CONSTANCE BAKER MOTLEY, ESQ., MICHAEL MELTSNER, ESQ., and LOIS WALDMAN, ESQ., of New York, N.Y.,
Attorneys for Plaintiffs

WHITMAN, RANSOM & COULSON, of New York, N.Y.,
Attorneys for Defendants,
CHARLES F. PREUSSE, ESQ., JOHN V. THORNTON, ESQ., BERNARD L. SANOFF, ESQ., and PINCUS M. BERKSON, ESQ., of Counsel.

TYLER, D. J.

Plaintiffs have sued to enjoin the New York World's Fair 1964-1965 Corporation (Hereinafter "the Fair Corporation") from preventing them from picketing and disseminating handbills in a peaceful and orderly manner inside the Fair grounds before certain specified pavilions or exhibits. More particularly, the present application seeks a temporary mandatory injunction to compel the Fair Corporation to grant plaintiffs the right to picket and pass out handbills. Jurisdiction is stated to rest upon the provisions of 28 U.S.C. 1343(3) and 42 U.S.C. 1983.

Plaintiffs assert that on May 20, 1964 a lawyer of the NAACP Legal Defense and Educational Fund, Inc. acting on their behalf sent a telegram to Mr Robert Moses, President of the Fair, requesting permission, upon payment of regular admission prices, to picket peacefully in "public areas in front of or near the Florida and Louisiana Pavilions," and further requested "permission for a reasonable number of persons to distribute handbills relative to racial discrimination on May 28, 1964 at the Fair" in the areas aforementioned. The telegram also asked the favor of a prompt reply. It is conceded that the Fair Corporation never replied to this telegram request.

Plaintiffs therefore contend that their suit is one in equity specifically authorized by statute to restrain a claimed deprivation, under color of state law, of their rights, privileges and immunities secured by the First and Fourteenth Amendments to the Constitution Essentially, they claim that, under the facts and circumstances here involved, the Fair Corporation is prohibiting them and others similarly situated from picketing peacefully and passing out handbills before designated pavilions within the Fair grounds and that this prohibition amounts to action of a state instrumentality setting under color of state law. More particularly, plaintiffs argue that they have a constitutional right to do these acts within the enclosed confines of the Fair grounds, particularly inasmuch as there has been sufficient state involvement in and impact upon the World's Fair organization, operation and site so as to establish the roads and walkways within the Fair grounds as public thoroughfares

It is argued for the Fair Corporation that there is no such state action or control as to permit this court to take jurisdiction and that, secondly, and in any event, there has been no denial of a substantial constitutional right of the plaintiffs. Moreover, it is urged that picketing, even if reasonably peaceful, within the crowded confines of the Fair grounds would be inherently dangerous; that paying patrons have a right to be protected against picketing of any kind under circumstances where they are paying for amusement, education and culture; and that to permit these plaintiffs to picket would, of necessity, open the Fair gates to many and diverse groups desiring to picket, all of which would create such formidable obstacles to operation and enjoyment of the Fair as to be legally and factually impracticable.

The first question to be answered is whether there is sufficient "state action" or control as to confer upon this court jurisdiction of this controversy. As plaintiffs and defendants are well aware, neither the aforementioned statutes nor the Fourteenth Amendment are aimed at essentially private conduct

There appears to be no substantial dispute about the following facts:

By Chapter 429 of the Laws of New York of 1960, a New York State Commission on the World's Fair was established to prepare for the State's active participation in the 1964-1965 Fair. In 1962, the legislature further provided that this Commission be empowered to perform such acts as would be necessary and appropriate to insure that "the maximum number of visitors will be attracted to the state's exhibits and the entire state during the fair period." (L. 1962, Ch. 818.)

Previously, on August 18, 1959, the Fair Corporation had been organized and chartered as a membership corporation under the laws of the State of New York. Its charter states, among other things, that the 1964-1965 World's Fair is to be held and operated for "exclusively educational purposes."

On May 27, 1960, the City of New York entered into a lease agreement with the Fair Corporation. By its terms, the City leased to the Fair Corporation real property which actually is part of Flushing Meadow Park, a City facility. Thereafter, on June 10, 1960, the agreement of lease was approved by the Board of Estimate of the City of New York. Under the terms of its lease agreement with the City, the Fair Corporation does not pay any specified rental.

It is obliged to pay over to the City, however, all net revenues remaining to its credit after the close of the Fair. At this time, it is estimated that all of such net revenue will probably amount to around fifty million dollars. Moreover, the Fair Corporation is obliged under the terms of its lease to turn over to the City, at the end of the Fair in 1965, all buildings, structures, pavements and other facilities useful for park purposes as certified by the Commissioner of Parks of the City of New York.

The Fair Corporation has raised its capital and operating funds through the sale of promissory notes and by means of bank loans; in addition, it has raised monies through rental of space to exhibitors, concessionaires and others. It also has raised funds through advanced ticket sales. These monies have been used for the construction of the Fair grounds and for current operations. The City of New York has expended twenty-four million dollars in the area; this money was appropriated by the City in accordance with usual capital budget procedures to pay for permanent improvements in Flushing Meadow Park, which, of course, is the site of the Fair.

Approximately seven hundred million dollars have been invested in the Fair, including all building and exhibit costs and operating expenses. The governments of the United States, the State of New York, the City of New York and a number of other states have participated in this investment for construction and operation of their own exhibits and, in the case of the City of New York, for the permanent park improvements referred to hereinabove. None of these governmental funds have been appropriated, however, for use by the Fair Corporation.

The United States, the State of New York and the City of New York have granted to the Fair Corporation tax exemptions respecting property, receipts, sales, fees and other income.

The arterial highways in the vicinity of the Fair site were concededly constructed on an accelerated basis in view of the fact that the Fair was being held this year and next. Obviously, both the State of New York and the federal government have expended funds and otherwise participated in the development and construction of these highways. No funds from governmental sources for these highways have been contributed to or paid over to the Fair Corporation, and it appears beyond controversy that the highways were constructed in accordance with the usual federal and state statutory authorizations.

The Fair Corporation has entered into contractual arrangements with the Pinkerton Agency whereby the latter agency supplies a force of approximately 1,000 men to handle policing and security arrangements in and at the Fair grounds. Section 1 of Chapter 892 of the Laws of the State of New York of 1963 provides that members of the private police force at the Fair site are to be deemed "peace officers" within the meaning of that term as used in state statutes.

Section 3 of Chapter 892 of the New York Laws of 1963, as amended by Chapter 580 of the Laws of 1964, purports to define the status of certain streets, roads, sidewalks and walkways within the Fair site under the jurisdiction of the Fair Corporation. It reads as follows:

> "A violation of any provision of law relating to safety, regulation of traffic or the preservation of order occurring at or on the streets, roads, highways, sidewalks, walkways,

> parking fields, parking areas, parking facilities or bus terminals of the property under the jurisdiction of New York World's Fair 1964-1965 Corporation shall be deemed to have occurred on a public street, road, highway, sidewalk, walkway, parking field, parking area, parking facility or bus terminal and not on private property, and such parking fields, parking areas, parking facilities and bus terminals shall be deemed streets, roads or highways. This act shall not, however, affect the private property status of such streets, roads, highways, sidewalks, walkways, parking fields, parking areas, parking facilities or bus terminals for the purposes of subdivision fourteen of section sixty-one of the public service law, or for the purposes of any law, act or ordinance relating to taxation or licensing or for regulatory or any other purposes; nor shall this act or any other law, act or ordinance be deemed to require the registration of such vehicles as may be authorized by the New York World's Fair 1964-1965 Corporation for use, operation or display within the property under the jurisdiction of said corporation which vehicles are used, operated or displayed solely thereat, or to require the licensing of the owners, chauffers, operators or drivers of such vehicles."

Prior to the opening in April of this year, the Fair Corporation adopted a regulation concerning picketing, demonstrations, etc., which regulation at least theoretically is still in effect and provides:

> "Demonstrations, parades, congregations, picketing or other similar acts on the Fair site are prohibited except under written permit of New York World's Fair 1964-1965 Corporation. No person may enter the Fair site with sticks, placards, handbills or other materials for use in an unauthorized demonstration. Any person violating this regulation is a trespasser, subject to ejection from the Fair, arrest and prosecution."

It has been stated by its officials in this proceeding that the Fair Corporation has adopted the policy of not permitting picketing of any kind by any person or group within the Fair site. Neither in their papers nor upon oral argument have defendants attempted to explain how and why the subject of picketing was specifically included in their regulation in the first place.

There is no evidence, nor do plaintiffs argue, that the Fair Corporation or any of its agents has been guilty of any discrimination against plaintiffs or other similarly situated in its operating practices such as employment, admissions and the like. Nor is there any indication in this record that the operators of the Florida and Louisiana pavilions have practiced any discrimination against members of the public.[1]

As is now widely known, the Fair Corporation charges general admission fees of $2.00 per adult and $1.00 per child. It is presently estimated that there will be 70,000,000 total paid admissions to the Fair in 1964 and 1965. This is an average of about 200,000 persons per day when one takes into account that the Fair will be open a little less than six months in each of the two years. To date, the highest daily attendance has been 300,000 persons, but there is reason to expect that there may be days when as many as 500,000 persons will be at the Fair site.

Since the Fair grounds consist of 646 acres of land, the crowd density on an average day of 200,000 paid admissions is not inconsiderable, especially when there is factored "in" some 30,000 workers on the scene and when there is factored "out" a substantial number of acres devoted to parking lots, landscaping, sculpture and other structures in or on which people cannot congregate.

Upon analysis of the foregoing facts, I find that the Fair Corporation and its operations are so impregnated with and supported by state and city action as to place them within the ambit of the Fourteenth Amendment. This is so even though it may be reasonably inferred that the Fair Corporation does possess certain indicia and aspects of "private" ownership and dominion.

As the majority opinion pointed out in Marsh v. Alabama, 326 U.S. 501, at p. 506 (1946), "(o)wnership (of property) does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it". Upon the uncontested facts here, it would be sophistry to argue or conclude that the Fair is a completely private venture, even though it is operated by a private corporation. As a high state court has already

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[1] The record is also silent as to the direct involvement, if any, of the States of Florida and Louisiana in the pavilions in question. Since the argument of this motion, various newspapers in New York City have reported that the State of Louisiana has withdrawn from the operation of the pavilion bearing its name. This court, however, makes no finding to this effect or with regard to this particular subject.

(Four lines missing)

--- App. Div. 2d---, 248 N.Y.S. 2d 676, at p.679 (App. Div., 2d Dept. 1964).

The Fair purposes, as indicated heretofore, are explicitly set out in its certificate of incorporation. They are "to organize, construct, hold and operate a world's fair in the City of New York for the exclusively educational purposes of educating the peoples of the world as to the interdependence of nations and the need for universal peace". Educating the populace is a proper function of the state, and where the state creates separate instrumentalities to carry on its work, the latter may become subject to the constitutional restraints imposed upon the state itself. See Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (4th Cir.), cert. den.326 U.S. 721 (1945). "The test is not whether the . . . (defendants) are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action". Nixon v. Condon, 286 U.S. 73, 89 (1932); Anderson v. Moses, 185 F. Supp. 727, 733 (S.D.N.Y., 1960).

The federal courts have recognized that when a city or state leases public property in such a manner and for such purposes wherein services of a kind that the city or state could render or has rendered are actually performed by a "private" lessee, the letter stands in the shoes of the government entity, Hampton v. City of Jacksonville, 304 F. 2d 320 (5th Cir. 1962), cert. den. sub. nom. Ghioto v. Hampton,371 U.S. 911 (1962); Derrington v. Plummer, 240 F. 2d 922 (5th Cir.), cert. den. sub. nom. Casey v. Plummer,353 U.S. 924 (1957), and such lessee must comply with the proscriptions of the Fourteenth Amendment. Burton v. Wilmington Parking Authority et al, 365 U.S. 715 (1961).

Furthermore, the courts have found state action to exist even in cases where there has been a sale, rather than a lease, of public property. See Hampton v. City of Jacksonville,supra; Smith v. Holiday Inns of America, Inc., 220 F. Supp. 1 (M.D. Tenn. 1963). Indeed, the crucial test of state action is said to be "the actuality of state involvement rather than the form of the transaction". Smith v. Holiday Inns, supra, at p. 8.

Similarly, mere acceptance of significant governmental appropriations has been held sufficient to render a "private" recipient subject to the restrictions of the Fourteenth Amendment. Simkins v. The Moses H. Cone Memorial Hospital, 323 F. 2d 959 (4th Cir. 1963).

Plaintiffs here ascribe much importance to the fact that the state legislature has deemed the police force provided by the Fair Corporation to be "peace officers" of the state. "When given police powers, individual citizens become state agents without question. . . ." Baldwin v. Morgan, 251 F. 2d 780, 790 (5th Cir. 1958). See also, Williams v. United States, 341 U.S. 97 (1951). The reason is that a private person or entity "' . . . takes its character as a state agency from the duties imposed upon it by state statutes . . . . '" Ibid.

In addition, Section 4 of Chapter 892 of the New York Laws of 1963 raises the status of regulations promulgated by the Fair Corporation to that of municipal ordinances. It provides as follows:

> "New York World's Fair 1964-1965 Corporation may prepare a special code or codes of law dealing with prohibited acts, protection of life and property, regulation of traffic, fire prevention, regulation of parking, preservation of the peace and the arrest of offenders or (sic) any of the above. Such special code or codes shall be submitted to the council of the City of New York for its approval, and if such code or codes are approved by such council, then such council may enact the same as and for a special code or codes of law governing the area leased to New York World's Fair 1964-1965 Corporation and such special codes shall be administered and enforced by New York World's Fair 1964-1965 Corporation and the police force provided by it. Such special codes shall have the force and effect of local laws of such city and all provisions of the New York City Charter, the administrative code of such city and all acts of the legislature and all local laws which may conflict with any provision of such special code or codes shall be and they hereby are suspended insofar as the area under the jurisdiction of New York World's Fair 1964-1965 Corporation is concerned

> during the term of the lease of such area to New York World's Fair 1964-1965 Corporation. Any violation of such special code or codes so adopted shall be a misdemeanor unless otherwise provided therein and all fines and penalties collected thereunder shall be the property of the city of New York. Such special code or codes may be amended from time to time in the same manner as provided for their enactment."

Thus, not only are the Fair officers "Peace officers" of the state, but also they purport to act as such by virtue of the authority of municipal law. This is undoubtedly acting under "codes of law," Valle v. Stengel, 176 F. 2d 697 (3d Cir. 1949), and may be sufficient unto itself to vest this court with jurisdiction. It is of some significance that the Fair regulation concerning picketing, among others, is given the effect of local law to such an extent that the state and local courts are given jurisdiction to try persons charged, for example, with trespass or breach of the peace and mete out punishment to them in the name of the state.

It seems inescapable, therefore, that the State and City of New York, with all propriety and by specific executive and legislative fist, have significantly contributed, and continue so to do, to the control and operation of the 1964-1965 World's Fair. If this be so, if follows that, at least for certain purposes, the Fair is a public or quasi-public venture and, that its officers and agents cannot ignore the constitutional rights of those members of the public who use and enjoy the Fair facilities.[2]

This conclusion, without more, does not lead to easy answers to the merits of the issues posed by this motion. As even plaintiffs must concede, there do not appear to be any reported cases which, upon squarely analogous facts, support the plaintiffs' position in full.

For reasons to be discussed briefly hereinafter, I determine that plaintiffs are not entitled to an order permitting them to picket at the desired locations within the Fair site but that an appropriate order should issue to permit dissemination of handbills at designated stations within the Fair gates.

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[2] In so saying, this court is aware of a decision of the Criminal Court of the City of New York, Queens County, People v. Collins et al., decided June 11, 1964, wherein it was held, inter alia, that the Fair grounds are private property. Assuming that I have correctly interpreted the holding to this extent, I cannot entirely agree with it.

Taking up first the claimed right to picket before the Louisiana and Florida Pavilions, the Supreme Court has consistently recognized that a state has the right to refuse or prevent picketing under certain circumstances. See *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Teamsters Union v. Hanke,* 339 U.S. 470 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Cox v. New Hampshire*, 312 U.S. 569 (1941). Plaintiffs apparently do not quarrel with this proposition as such, but they do urge that the Fair Corporation's rejection of their request to picket falls at least generally within the scope of such discriminatory "state action" cases as *Burton v. Wilmington, supra*.and such "free speech" cases as *Marsh v. Alabama*, *supra*.

The important question here is whether under all the surrounding circumstances the regulation controlling the use of the Fair's streets, so far as picketing is concerned, "den(ies) or unwarrantedly abridge(s) the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Cox v. New Hampshire*,312 U.S. 569, 574 (1941).

The Supreme Court, wisely enough, has never expounded rules of general application in this area. On the contrary, that court has recognized that "the specific situations" are controlling. *Hughes v. Superior Court*,339 U.S. 460, 465 (1950). As I understand the cases, the most that has been said of general application is that picketing is a "hybrid" right which "cannot dogmatically be equated with the constitutionally protected freedom of speech." *Teamsters Union v. Manke*,339 U.S. 470, 474 (1950). See, also, *Hughes v. Superior Court*, *supra*.

Upon careful appraisal of the nature of the Fair operation and all the other circumstances indicated by the record before me, I conclude that plaintiffs have not established that they are entitled to a temporary injunction allowing them to picket before or near the places desired within the Fair grounds. The conclusion might be otherwise were plaintiffs complaining of discrimination or other deprivations of their rights by the City or State of New York or by the Fair Corporation itself. But, concededly, they are not. It might also be otherwise if the streets and walkways of the Fair were open and accessible and without such barriers as fences, gates and ticket windows. But, clearly, the Fair grounds differ in significant respects from the usual streets and thoroughfares of a city or town, even including a "company" or privately owned town.

Moreover, informational picketing of the type understandably sought here is not clearly a desirable method for plaintiffs to use when weighed against such factors as the crowds in attendance, the relatively restricted areas and spaces, the convenience and enjoyment of visitors who pay admission and the like. A picket line usually produces more coercive influences, takes up more room and creates more need for security measures in a crowded area than does, for example, a speaker or a handbill distributor; these considerations can be said to apply with a special practical impact in an area such as the Fair grounds. The discrimination cases cited by plaintiffs do not vitiate or exclude such considerations here; the obvious proposition that access to Fair facilities cannot be discriminatively denied may not be transposed without more into specific authority for all who enter the Fair to picket when and where they choose.

It does not follow, however, that plaintiffs may not engage in a reasonable method of disseminating handbills from stations on the public walkways near the two pavilions in question. In considering a case involving the right to picket, the Supreme Court has recognized that, "Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line." Hughes v. Superior Court, 339 U.S. 460, 465 (1950). As discussed hereinabove, the right to distribute handbills normally has been given a higher position in the hierarchy of constitutionally protected activities than has the right to picket. Both methods are designed to convey information. The state is given greater latitude, however, in controlling the right to picket since " the very purpose of a picket line is to exert influnces, and it produces consequences, different from other modes of communication." Ibid. In the absence of a claim of discrimination by the State, the City or the Fair Corporation, there is no overriding reason why plaintiffs should have the right to "exert influence" and "produce consequences" which are the normal effects of a picket line. Conversely, there is no compelling reason why they should not have the right to quietly and peacefully disseminate informational literature or handbills, a right more jealously preserved and protected by the Constitution. Contrary to defendants' arguments, those of us who pay the regular admission fee and attend the Fair cannot be totally insulated from our fellows, nor can we expect to be shielded from expressions or ideas which are unanticipated and unsolicited. An individual's right of privacy is of practical necessity limited by the rights of others when he leaves his home and ventures forth into public areas, even those which he must pay to enter. See Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

Defendants voice the fear that granting plaintiffs relief will convert the Fair grounds into an ideological battlefield. The short answer to this argument is that this court necessarily is limited to consideration of plaintiffs' application and none other; moreover, nothing contained in this opinion should be construed to confer an automatic license upon all others who may yearn to pass out handbills within the Fair grounds. On the other side of the coin, the remarks of this court cannot be interpreted to preclude picketing by other groups under other circumstances.

Finally, what has been implied heretofore must be expressed with regard to the Fair Corporation's regulation purporting to cover picketing, demonstrations and similar activity. As drafted and as construed by the defendants in this instance, it is arbitrary and vague and, as such, an unconstitutional burden on the enjoyment of free speech. Reasonable standards can be promulgated so that those who administer the regulation may not have totally unfettered discretion to determine whether to grant or withhold permission to picket and speak and disseminate informational literature. This is not to say, however, that defendants have to permit all kinds of demonstrations, picketing and the like, nor is it suggested that reasonable restrictions as to time, numbers, places or extra fees to cover extra services, for example, cannot be considered and implemented.

Settle order in conformity with the foregoing matters.

Dated: New York, N.Y.
June 30, 1964.

U.S.D.J.

(Discrimination suit against Jefferson Bank & Trust Co., St. Louis, Mo)

Folder 25

ate Historical Society of Wisconsin

Please Retain Original Order

US District Court Brief

POINTS AND AUTHORITIES

I

THE JURISDICTION OF THE UNITED STATES DISTRICT COURT IS PLENARY

Townsend vs Sain	83 S.Ct. 745
Fay vs Noia	83 S.Ct. 822
Title 28 USCA Sec 2241-2255	

II

THE TRIAL COURT WAS WITHOUT JURISDICTION TO ISSUE ITS RESTRAINING ORDER: AND THE SUBSEQUENT PRETENDED TRIAL AND CONVICTION OF THESE PETITIONERS FOR CRIMINAL CONTEMPT WAS A DENIAL OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW CONTRARY TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

a. A Labor Dispute Existed Within the Pre-empted Field of the Federal Government.

New Negro Alliance vs Sanitary Grocery 58 S. Ct 703,303 U. S. 552
Navios Corp. vs National Maritime Union 402 Pa 325,166A (2) 625
Donnley vx Dubinsky - 154 F(2) 38
J. J. Newberry Co. vs Retail Clerks 67 F. Supp 86
Tri-Plex Shoe Co. vs Cantor 25 F. Supp 996
Angles vs Ousley 332 S.W(2)457
Graybar Elec. Co. vs Automotive Petroleum Workers - 287 S.W(2) 794
Guss vs Utah Labor Relations Board 77 S. Ct 598
Garner vs Teamsters 74 S. Ct. 161
Youngdahl vs Ringfair, Inc. 78 S.Ct. 206

b. The Issuance of the Restraining Order was State Action in a Proscribed Field.

Ex parte Virginia	110 U. S. 339
AFL vs Swing	312 U. S. 321, 61 S.Ct. 568
Shelley vs Kraemer	68 S.Ct. 836

c. The Restraining Order was Void Because Jurisdictional Conditions Precendent Were Not Satisfied.

Kimealy vs Staed	55 Mo App 176

d. The Contempt Proceedings as to These Petitioners are Void. Petitioners were not Parties to the Injunction Suit, Nor Covered by the Restraining Order, nor Covered by the Bond.

Ex parte Dillon	76 SW(2) 1095

e. The Construction of the Court as to the Meaning of R. S. Mo. 1959, Section 526.070 by which it Abrogated a Construction of Long Standing Abridged the Obligation of Contract.

12 Am Jur.(2) Sec 26 page 495

f. The Missouri Supreme Court Failed to Resolve the Conflict between the Kansas City Court of Appeals and the St. Louis Court of Appeals.

State of Missouri vs Katz Drug Co. 352 SW(2) 678
Fred Harvey vs Sam Priest 366 SW(2) 324
Const. of Mo. Art 5, Sec. 10

III

THE TRIAL COURT EXCEEDED ITS JURISDICTION TO TRY OR TO CONVICT THESE PETITIONERS FOR CRIMINAL CONTEMPT, AND BY SO DOING DENIED TO PETITIONERS THEIR RIGHT TO DUE PROCESS AND TO THE EQUAL PROTECTION OF THE LAW CONTRARY TO THE FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

a. Statutes, Supreme Court Rules, Judgments of the Trial Court and Decisions and Judgment of the Court of Appeals was unconstitutionly applied as to these Petitioners in that they were tried for Civil Contempt, in a Civil Contempt Proceeding but Found Guilty of a Criminal Contempt Contrary to Supreme Court Rule 35.01 and Decisions of the Appellate Courts.

Fiedler vs Bambrick Bros Constr. Co. 142 S. W. 1111
Ex parte Heffron 162 S.W. 652
State Ex rel_____vs Bland 88 S.W. 38

b. The Trial Court and the Court of Appeals by Their Interpretations of the Judgement of the Trial Court as Finding Petitioners Guilty of Criminal Contempt Contrary to the Statutes, Rules, and Prior Decisions of the State Appellate Courts Denied to Petitioners Their Right to Appeal and Bail Pending Review of Their Convictions.

Gompers vs Buck's Stove & Range Co. 221 U.S. 418, 31 S.Ct. 492

g. Failure of the Trial Court to Comply with Rule 35.01 Vitiated the Entire Proceedings and the Judgment is Void.

McCann vs N. Y. Stock Exchange 80 F(2) 211
FTC vs McLean & Sons 94 F(2) 802
U.S. vs Montgomery 155 F Supp 633

d. Punishment of a Definite Term and Fine for a Civil Contempt is Cruel and Unusual Punishment.

State ex rel Hawkins vs Utley 124 S. W.(2) 685
Carder vs Carder 61 S. W. (2) 308
State vs Norman 193 S. W. (2) 391
Osborne vs Purdome 250 S. W. (2) 159
Carey et al vs Dist Ct. of Jasper Cty 285 N. W. 236
Ex parte Fortenburg 101 Pa (2(105
Busch Jewelry Co., Inc. et al vs Silvers et al 8 NYS 592
Fansteel Metallurgical 14 N.E.(2) 991

e. The Court by Permitting a Substantive Charge from Civil to a Pretended Criminal Contempt after Depositions, and a Reading into Forced Testimony Against Temselves.

Gompers vs Buck's Stove & Range Co. 221 U.S. 418, 31 S. Ct. 492

f. Petitioners are Victims of an Entrapment by the Aid and Active Assistance of a State Agency .

g. The Findings and Commitment Orders are Legally Insufficient on their Face.

Glenn vs Hendrix 349 S. W. (2) 532
Ex Parte Fuller 50 S. W. (2) 654
Odom vs Langston, 213 S. W. (2) 394
G_____ vs Souder 305 S. W. (2) 883

Part One

FACTS

1. The Petitioners have been sentenced to definite terms ranging from 60 days to nine (1) months in the City Jail in the City of St. Louis, Missouri, and fined Five Hundred Dollars ($500.00) to One Thousand Dollars ($1,000.00) each and ordered to pay one-ninth (1/9) of the court costs. (See Findings of Fact and Judgments and Orders of Commitment)

2. The Saint Louis Committee of Racial Equality commonly referred to as CORE, is a branch of the national organization known as the Congress of Racial Equality. St. Louis CORE has sought to alleviate racial discrimination in public accommodations, housing, government, business and particularly in the area of employment where it has sought to improve working conditions and equal employment opportunities for Negroes by establishing standards of equal employment and equal promotional practices.

(a) The plaintiff, Jefferson Bank and Trust Company, is a federally insured bank engaged in substantial interstate commerce.

(b) For a period of three or four years, St. Louis CORE had negotiated with JeffersonBank in an attempt to secure jobs for Negroes and opportunities for equal advancement and promotion for Negroes. About August 14, 1963, St. Louis CORE wrote a letter to the Jefferson Bank and Trust Company asking the bank to employ four (4) Negroes in clerical capacities. The Jefferson Bank replied with a written communication denying the request. Later, St. Louis CORE sent a commitee to the bank for a conference urging the bank to act favorably upon the request for the employment of Negroes. The bank refused to hire four Negroes or consider alternate plans for the hiring of Negroes presented by the CORE committee.

3. The background of the convictions stem from a suit for Injunction filed by the Jefferson Bank and Trust Company in the St.

Louis Circuit Court on the 29th day of August, 1963. That case is styled according to the Petition for Injunction as follows:

(a) "Jefferson Bank and Trust Company, a corporation, Plaintiff vs Robert B. Curtis, William L. Clay, Charles R. Oldham, Marian Oldham, Lucien Richards, Clyde S. Cahill, Jr. Richard Daly, Walter Hayes, Rev. Charles Perkins, Norman Seay, Herman Thompson, and Melvin West, individually and as representatives of a class known as St. Louis Committee of Racial Equality, defendants," being Cause No. 57945 E.

(b) The summons as prepared and served in said Cause was as follows:

"That State of Missouri to defendants Robert B. Curtis, William L. Clay, Charles R. Oldham, and Marian Oldham, Lucien Richards, Clyde S. Cahill, Jr., Richard Daly, Walter Hayes, Rev. Charles Perkins, Norman Seay, Herman Thompson, Melvin West, Individually and as representatives of a class known as St. Louis Committee of Racial Equality."

(c) The Return of Service on the Summons as made by MARTIN L. TOZER, Sheriff, dated August 30, 1963, is as follows:

"I hereby certify that I have served the within summons (1) by delivering on the 30th day of August, 1963, a copy of the Summons and a copy of the Petition to each of the within named defendants, Robert B. Curtis, William L. Clay, Marian Oldham, Lucien Richards, Rev. Charles Perkins, Norman Seay, Herman Thompson, individually and as representatives of a class known as St. Louis Committee of Racial Equality. After due and diligent search in the City of St. Louis, Missouri, the following defendants could not be found in the City of St. Louis, Missouri, Melvin West, Richard Daly, and Walter Hays."

(d) In paragraphs two (2) and three (3) of the body of the petition for injunction filed by plaintiff bank reference is made again to the defendants individually and as representatives.

(e) In paragraphs one (1) and two (2) of the prayer in plaintiff bank's petition for an injunction are found the following:

"(1) That this court issue its restraining order, restraining and enjoining the defendants and each of them and all persons acting by, through, or under them, and every other person or persons acting under the direction or instruction or in concert with them from: . . ."

"(2) That with or without issuing its restraining order as prayed above, and with or without an order to show cause, this court issue its temporary injunction restraining and enjoining the defendants and all other persons mentioned above in said paragraph one (1) of this prayer." (See Exhibit P-3)

(f) At 1:55 p.m., Friday, August 30, 1963, the Court issued a temporary restraining order, the first paragraph of which is as follows:

> "In the Circuit Court of the City of St. Louis, State of Missouri, Jefferson Bank and Trust Company, a corporation Plaintiff vs Robert B. Curtis, et al. #57945 R, Division No. 2 Temporary restraining order to issue to all defendants individually and as representatives of a class known as St. Louis Committee of Racial Equality from: . . . " (See Exhibit P-4)

(g) The indemnity bond filed by the bank was not responsive to the restraining order issued by the court in that it indemnified only the named individuals and did not indemnify the members of the class.

The following facts apply to the case of Ex parte Curtis et al, Cause No. 64 C 52 (3).

1. After the final negotiations with the bank St. Louis CORE held a strategy meeting on August 29, 1963 and voted to take direct action against the bank. On the afternoon of August 30, 1963 petitioners and other demonstrators appeared at the bank and engaged in peaceful picketing until about 5:10 p.m. at which time a number of demonstrators stood in front of the bank doors and later large numbers of the demonstrators entered the bank, sang freedom songs, and sat on the floor of the bank. None of the petitioners herein stood in front of the bank doors and only one of these petitioners demonstrate inside the bank. The demonstration ended at 6:00 p.m. and everyone left the bank. No arrests were made and no requests for the arrest of any persons was made by any bank representative.

2. On Saturday evening, August 31, 1963, a special session of court was called and the bank attorney filed an application for citation asking for attorney fees, and costs and expenses on behalf of the plaintiff bank. The court in an ex parte proceeding issued body attachments for Petitioners directing the Sheriff to produce the

Petitioners before the court on Tuesday, September 3, 1963. The Sheriff subsequently attached the Petitioners and held them at the City Jail unless bail was furnished in the sum of $10,000. One Petitioner furnished bail and the remaining four were held in the custody of the Sheriff until released by the St. Louis Court of Appeals.

3. On Tuesday, September 3, 1963, Petitioners were brought before Division 2 of the Circuit Court of the City of St. Louis, their attorneys and Petitioners were served for the first time with copies of the attachment and the application for contempt citation. Petitioners' motion for a continuance was denied and they were granted 30 minutes to confer with their attorneys. Leave for time to file an Application for Writ of Prohibition in the St. Louis Court of Appeals was requested and the court allowed 24 hours for the filing of this Writ. On Tuesday afternoon an Application for Writ of Habeas Corpus was filed in the St. Louis Court of Appeals on behalf of four of the Petitioners who had not made bail and who were still in jail, and said Petitioners were released by the Court of Appeals at a night session. On Wednesday, September 4, 1963, Petitioners' Application for Writ of Prohibition was denied and the trial court then continued the Proceedings at the suggestion of the Court of Appeals. Depositions on behalf of Petitioners and plaintiff bank were taken and Petitioners appeared and gave testimony on September 7, 1963. On September18, 1963, eleven days after Petitioners were deposed under the Rules of Civil Procedure the attorney for the bank was appointed as Special Prosecutor and on September 18, 1963, Petitioners were served for the first time with a notice setting forth the facts constituting the contempt charged. On September 23, 1963, trial was commenced and during the trial it appeared that the attorney for the bank, who is the son-in-law of the president of said bank, had interviewed a 16-year-old member of the defendant class

and promised her and her brother immunity if she would "cooperate" and testify on behalf of the bank. Plaintiff's attorney, now the special prosecutor, told the class defendant that she could be placed in prison and he could extradite her brother from Wisconsin "if I please".

4. Petitioners were found guilty and "punished as for criminal contempt" and committed on the 25th day of October, 1963, to the City Jail of St. Louis, Missouri, on fines ranging from Five Hundred Dollars ($500.00) to One Thousand Dollars ($1,000.00), and imprisonment ranging from 90 days to nine months in the City Jail where they have since remained in custody of the Warden of said jail, except for the period of time they were admitted to bail pending a Habeas Corpus Proceeding in the St. Louis Court of Appeals.

The following facts apply to the Case of Ex parte Ford, et al, Cause No. 64 C 52 (3).

1. The Petitioners herein were not parties to the suit for injunction filed on August 29, 1963, were not members of the class known as St. Louis CORE and were not named in the restraining order and subsequently were not made parties to said suit or named in the restraining order and were not covered by the terms of the indemnity bond filed by the bank nor has said bond been enlarged to involve those Petitioners.

2. On Friday, October 4, 1963, the Petitioners went to the Jefferson Bank and Trust Company and entered said bank about 4:15 p.m carrying signs reading "4 JOBS." Inside the bank they sang freedom songs, locked arms, sat and stood in front of the entrances to the bank. Petitioners were arrested about 5:20 p.m., taken to police headquarters and charged with peace disturbance and with trespassing.

3. While Petitioners were at police headquarters, from 5:30 to 8:00 p.m., numerous requests were made by some of them to call rela-

tives and confer with counsel. These requests were denied.

4. About 8:00 p.m., Friday, October 4, 1963, while Petitioners were still in custody of the police authorities, they were served by the Sheriff of the City of St. Louis with a body attachment. Petitioners were then taken immediately by the Sheriff to Division 2 of the Circuit Court of the City of St. Louis and ordered to trial forthwith at 10:00 p.m.; the Court heard testimony of three witnesses on behalf of the plaintiff bank, admitted Petitioners to bail in varying amounts ranging from $1500.00 to $5000.00 at 3:00 a.m., Saturday morning, October 5, 1963, and continued said cause to Monday, October 7, 1963, at 10:00 a.m. for further hearing; but at no time were Petitioners notified, either orally or in writing, of any charges of criminal contempt made against them.

5. On Monday, October 7, 1963, Petitioners objected to proceeding to trial on the ground that no citation had been filed or charges made against these Petitioners, and hence they did not know what they were to defend against. Petitioners were overruled. Petitioners then made a request for time within which to file an Application for a Writ of Prohibition in the St. Louis Court of Appeals and were granted until 2:00 p.m. that same day to do so. The Writ was denied, and thereupon, Petitioners promptly filed their written motion for dismissal of the Proceeding. Said motion was overruled and the Court proceeded to trial. The attorney for the plaintiff bank stated in open court that Petitioners were being tried in a civil proceeding. The Court failed to advise Petitioners, despite repeated requests, of the nature of the proceedings and the specific charges against them. (See Exhibit P-11).

6. Petitioners were found guilty and "punished as for criminal contempt" and committed on the 25th day of October, 1963, to the City Jail of St. Louis, Missouri, on fines ranging from 60 days to one year in the City Jail where they have since remained in custody of the

Warden of said Jail, except for the period of time they were admitted to bail pending a Habeas Corpus Proceeding in the St. Louis Court of Appeals.

The following facts apply to the Case of Ex Parte Peake, et al, Cause No. 64 C 54 (3).

1. The Petitioners herein were not parties to the suit for injunction filed on August 29, 1963, were not members of St. Louis CORE and were not named in the restraining order and have not subsequently been made parties to said suit or named in the restraining order and were not covered by the terms of the indemnity bond filed by the bank nor has said bond been enlarged to involve those petitioners.

2. On October 7, 1963, the plaintiff bank made elaborate preparations and plans for handling demonstrations. Such plans consisted, in part, of stationing a bank employee at each door of the bank to admit only bank-selected persons whom the bank wished to do business with, and setting up a special facility at teller's window #10 for making change at a service charge of twenty-five cents (25¢) per transaction.

3. Petitioners were admitted to the bank on the afternoon of October 7, 1963 by the bank employees or guards posted at the doors and when petitioners did not leave at the request of the bank representatives, they were arrested and charged with peace disturbance and trespass.

4. While these Petitioners were in the custody of the police on the night of October 7, 1963, Earle J. Niederluecke entered his appearance as attorney for the bank and filed his verified motion for the issuance of an attachment against these Petitioners. The verification of said motion was sworn to three days (3) before the facts stated therein were alleged to have occurred. Said motion was granted

and the Sheriff attached the bodies of Petitioners and produced them in Court on October 7, 1963.

5. On the evening of their arrest Petitioners were brought before the court and ordered to plead to the charges alleged in the attachment order. Upon entering pleas of not guilty the trial court set October 10, 1963, as the date on which Petitioners were to be tried. On the morning of October 10, the trial was continued to October 14, 1963.

6. On October 14, 1963, attorneys for Petitioners announced that they were not ready for trial and filed motions for a continuance, and to use discovery procedures, each of said motions were overruled. Petitioners asked leave to file an Application for a Writ of Prohibition in the Court of Appeals. The trial court granted Petitioners until 2:00 p.m. to file the Application. The Writ was denied by the Court of Appeals and on the afternoon of October 14, 1963, Petitioners again announced not ready, but the trial court started the hearing at that time and the trial was concluded on October 16, 1963.

7. The trial court appointed the attorneys for the bank as special prosecutors; one of said attorneys is the son-in-law of the bank president and has a financial interest in the bank and the court refused to permit Petitioners to inquire into the other special interests, if any, of the other special prosecutor.

8. Petitioners were found guilty and "punished as for criminal contempt" and committed on the 25th day of November, 1963, to the City Jail of St. Louis, Missouri. Petitioners have since remained in the custody of the Warden of the City Jail except for the period of time they were admitted to bail pending a hearing and ruling on a Writ of Habeas Corpus in the St. Louis Court of Appeals.

ARGUMENT

1. The Jurisdiction of the U. S. District Court is Plenary.

Authority and jurisdiction for the action of federal courts in habeas corpus petitions is found in Title 28, §§2241 to 2255, Section 2243 reads in part as follows:

"The court shall summonly hear and determine the facts, and dispose of the matter as law and justice require."

Under these statutes the Supreme Court of the United States held in the case of Townsend v. Sain, 83 S.Ct. 745 that a federal court must grant an evidentiary hearing to a habeas applicant -- if the merits of the factual dispute were not resolved in the state hearing or the state factual determination is not fairly supported by the record as a whole -- or material facts were not adequately developed at the state court hearing.

The petitioners in the instant case are entitled to an evidentiary hearing to develop the federal questions which were not developed and resolved in the state courts of Missouri.

Petitioners have exhausted their state remedies under the decision of Faye v. Noia, 83 St 822 and are now entitled to proceed in this court under their application and answer to return to a full evidentiary hearing to develop and provide facts for a determination by this court of the federal issues presented by these petitioners.

2. The trial court was without jurisdiction to issue its restraining order and to try and convict these petitioners for criminal contempt; and the failure of the trial court to refrain from doing so, was a denial of due process of law and the equal protection of the law contrary to the 14th Amendment of the United States Constitution.

(a) Labor dispute existed within the meaning of the National Labor Relations Management Act and State authority is severely limited.

The facts involving the controversy before the trial court show that The St. Louis Committee on Racial Equality had asked the Jefferson Bank and Trust Company for four jobs of a clerical nature for Negroes. This request had been the subject matter of a series ofmeetings between the Bank and Core over a period of several weeks preceding the 30th of August, 1963. At the last meeting between Core and the Bank, the vice president of the bank informed the members of Core that he would give them no answer to their request, but that they would hear what his answer was in the newspapers. After that, and on the 14th day of August, 1963, the chairmen of Core wrote a letter to the bank informing the bank that since the bank had not honored Core's request, Core had decided to take direct action against the bank. On the 27th of August, 1963, the bank replied to Core's Chairmen, and in that letter the bank refused the request made on them by Core. The bank is located in a Negro neighborhood in St. Louis. Ten years between the present controversy arose, the bank employed 7 Negroes in Clerical positions, but with a change of administration, these Negroes were discharged and replaced by Whites. At the time that the petition for injunction was filed the bank had 62 Employees, two of which were Negroes, one of which was a messenger. No Negro has been employed at the bank in the last seven years, although many have attempted to make applications. The area immediately surrounding the location of the bank is a hard core unemployment area. The State of Missouri has in force a Fair Employment Practices Act, and the City of St. Louis has a similar provision. Both of these acts were in operation at the time the Petition for Injunction was filed. The bank is a federally insured state bank that deals in substantial interstate commerce, governmental contracts, and it is the local depositor of the funds of the Board of Education and the City of St. Louis. Although Five or more White persons have been employed at the bank since the beginning of this controversy between the parties, no Negro has been employed. The bank has large deposits of money in banks of other states. On August 29th, 1963, the bank filed a petition for injunction in the state Circuit Court, alleging, among other things that it was a state bank, located in St. Louis, and that defendants were officers and members of the St. Louis Committee on Racial Equality, or "Core" as it is called, and that Core is a voluntary unincorporated association; that defendants had written plaintiff a letter asking the bank to hire four Negroes, that the bank had refused; that Core had announced that at 4 p.m. on August 30th, 1963, it would sit-in, walk-in and lie-in in the bank; that such conduct would be an unlawful interference of plaintiff's business; and that plaintiff will be irreparably damaged as a result of this conduct; that the bank has no adequate remedy at law because of the duplicity of suits it would have to file and the insolvency of the defendants; that the unlawful conduct threatened is designed to get the bank to hire four Negroes; and that the threatened acts would interfere with the security of the bank's premises; and that the demands of the Core group are in violation to the State and City FECP laws, and Wherefore a temporary restraining order was pleaded for to restrain defendants from doing the acts set out above.

Upon the posting of bond, and without a hearing and a finding of facts, the court issued its temporary restraining order at 1:55 p.m. on August 30th, 1963, and copies of the restraining order were served on the defendants between 4:30 and 5:30 p.m. on the same day.

Argument

The Court did nothave the authority contrary to the National Labor Relations Management Act and the Fourteenth Amendment of the United States Constitution to enforce the racial discriminatory hiring policy of plaintiff federally insured bank by the use of theCourt's injunctive power where as here a labor dispute existed involving unfair labor practices concerning the terms and conditions of employment within the pre-empted field of the federal Government where the business is engaged in substantial interstate Commerce.

The Labor Management Relations Act, Title 29 U.S.C.A. 152 (9) defines a Labor Dispute: as follows:

> "(9) The term 'includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditionsof employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

In our case, Core had sent several of itsmembers to meetings with the bank to discuss Core's request that it hire four Negroes in teller positions. The bank refused to do this, thereby raising a controversy between the parties to the law suit over the terms of employment which Core was seeking to arrange with the bank. New Negro Alliance v. Sanitary Grocery Co. 303 U.S. 552, 58 S. Ct. 703, 82 L.Ed. 1012 (1938), Navios Corporation v. NationalMaritime Union of America, 402 Pa. 325, 166 A. 2d 625, 630. The parties to the controversy come within the contemplation of the National Labor Management Act, in that it is specially stated in Section 152 (9) of said Act that a labor dispute can arise "regardless of whether the disputants stand in the proximate relation of employer and employee." The Jefferson Bank and Trust Company further, is a state bank which deals in interstate commerce and it is therefore not in a class excluded by Section 152 (2) of Title 29. Also, the scope of the legislative undertaking is best reflected in the acts' preamble, 29 U.S.C. Section 141 (b), whih declares tht it is the purpose andpolicy of this chapter -- to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." The Jefferson Bank and Trust Company is a Federally Insured member of the Federal Deposits Insurance Corporation and Said bank has large depositors in and from other states, and deals in Federal Housing Association Contracts and Loans, making it involved in a dispute which affects interstate Commerce, over which the federal Legislation has taken jurisdiction by Act of Congress under the Labor Management Relations Law of 1947.

On August 17th, 1963, when the bank refused to consider the request of Core to hire four Negroes, a labor dispute arose.

Section 107 of the National Labor Relations Act reads in part as follows:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute as defined in Sections 101-105 of this title except after hearing the testimony of witnesses in open court, with opportunity for cross examination, in support of the allegations of a complaint made under oath and testimony in opposition thereto is offered, and except after findings of fact by the court to the effect - - -

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained * * *

(b) * * *

(c) * * *

(d) That complainant has no adequate remedy at law

(e) That the public officers charged with duty to protect complainant's property are unable or unwilling to furnish adequate protection.

The Federal courts haveinterpreted these provisions in a number of cases wherein labor disputes concerning interstate commerce involving the employer-employee relationship and in each instance the procedures set forth in the above title have been strictly adhered to. Donnley Garment Co. v. Dubinsky, 154 F 2d 38 (1946 CCA Mo. J. J. Newberry Co. v. Retail Clerks, 67 F. Supp. 86 (1946 Mo.);Tri Plex Shoe Co. v. Cantor 25 F. Supp. 996 (D.C.Pa. 1939).

In other situations the federal courts have applied the same tests to determine whether an injunction would issue in cases where interstate commerce was involved even though the relationship of employer and employee was not involved. New Negro Alliance v. Sanitary Grocery Co., supra.

The state courts are generally prohibited from issuing injunctions in cases involving labor disputes affecting interstate commerce where the relationship of employer and employee are involved. Angles v. Owsley, 332 S.W. 2d 457; Graybar Elec. Co. v. Automotive Pet. Wkrs., 287 S.W. 2d 794.

This then is a field pre-empted by Federal legislation except when a hearing is held and facts are found to exempt this particular case from the pre-emption of the Federal legislation. The question presented in this case is whether in the labor dispute that existed between CORE and the Jefferson Bank the lack of the relationship of employer and employee brings this case out from under the pre-empted field. Following the analogy of the New Negro Alliance, supra, case petitioners contend that the trial court was without jurisdiction to issue a temporary restraining order without having a hearing and making a finding as is required when a labor dispute affecting interstate commerce between employer and employee is brought before the court.

In Guss v. Utah Labor Relations Board, 77 S. Ct. 598 (1957 opinion) the Supreme Court of the United States referred to the term 'affecting interstate commerce' and pointed out that the Board had not exercised its full power, but the fact that it had not exercised its full power in the area did not give the state court of Utah the right to act. In Garner v. Teamsters, Chauffeurs & Helpers Union, 74 S. Ct. 161 (1953) the court considered the problem of dual jurisdiction and dual relief. The court posed the question the state could adjudge the same controversy and extend its own relief. The court held the state courts had been denied the right to act and said, l.c. 165, "(4) Congress confided 'primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that a centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or an application of the federal board, precludes state courts from doing so. . . . And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal board also excludes State courts from like action."

The court's attention is drawn to the case of Youngdahl v. Rainfair, Inc, 78 S. Ct. 206. This court's opinion illustrates the extreme circumstances which must exist before the state court can act.

Facts: "The issues here are whether, under the circumstances of this case, a state court may enjoin strikers and union representatives from (1) 'threatening, intimidating or coercing any of the officers, agents or employees of the employer at any place' and also 'from obstructing or attempting to obstruct the free use of the streets adjacent to the employer's property,' and (2) all 'picketing or patrolling' of the employers premises.'

Rainfair, Inc., was a Wisconsin corp. and owned and operated a plant in Wynne, Ark., a rural community of about 4,000 inhabitants. About 100 women and 7 men were employed in the manufacturing of men's slacks and were shipped in interstate commerce. None of the employees were members of a labor union.

In an effort to compel the employer to recognize the union as the bargaining agent of the employees, some of the women employees went on strike. A picket line was established on the street in front of the plant; strike headquarters were set up across the street from the plant, their numbers varied from 8 to 37. On one occasion nails were strewn over the company's parking lot. A week later the whole lot was 'seeded' with roofing tacks. Tacks were scattered in the driveway of the plant manager's home and on the driveway of 12 of the nonstriking women employees. The plant manager was told by a picket that he was 'nothing but trash' and that he would 'wipe the sidewalk with him'; he was followed each time he left the plant and was harrassed at night by shouting at his home and numerous anonymous telephone calls.

Under threat of being fired 3 employees returned to work. Thirteen new employees were hired. The strike ended, picket lines withdrawn and the strikers applied for reinstatement. Employer delayed reinstatement. Picket line reestablished to protest failure to recognize the union and reinstate the employees. In the meantime unfair labor practices were filed with NLRB.

A sharp instrument was driven into the tires of an employee and a black snake was left in the plant under a broken window. Union warned strikers against acts of violence. The tension was the result of an enormous amount of abusive language, name calling (scabs, etc.)

On the application of Rainfair, the Court issued a temporary injunction later made permanent (l.c. 210). The State Sup. Ct. affirmed; the U.S. Court granted certiorari because of the sweeping language of the decree.

Petitioners Contend: no violence, no threat of it, and no factual warrant for the injunction.

RULING BY THE COURT: l.c. 211 (3-5) The issue here is whether or not the conduct and language of the strikers were likely to cause physical violence.

"Words can readily be so coupled with conduct as to provoke violence."

"When in a small community, more than 30 people get together and act as they did here, and heap abuse on their neighbors and former friends, a court is justified in finding that violence is imminent.

However, the State Court entered the pre-empted field of NLRB insofar as it enjoined peaceful picketing by petitioners.

Note: The Chief Justice, Mr. Black, and Mr. Douglas were of the opinion that Congress has given the NLRB exclusive jurisdiction of this controversy, would reverse the ju. in its entirety and remand the cause to the state court for dismissal of the inj."

Petitioners contend that the trial court was without jurisdiction to issue the temporary restraining order and to try to convict these petitioners for criminal contempt.

(b) The trial court in issuing its restraining order violated the equal protection clause of the 14th Amendment to the United States Constitution. It is a well-settled principle of law that the prohibitions of Section 1 of the 14th Amendment apply to the state regardless of the department or agency through which it acts. That the action of state courts and judicial officers in their official capacities is regarded as action of the state within the 14th Amendment is a proposition which has long been established.

In this case the record is replete with testimony and offers of proof that the plaintiff bank has, over a period of many years, engaged in the unfair labor practice of excluding members of the Negro race from employment in other than menial jobs. This practice continues in spite of the fact that the State of Missouri has a Fair Employment Practices Law and the City of St. Louis has enacted a similar ordinance and in spite of the further fact that in its petition for injunctive relief it denies that it discriminates. The record further shows that the Committee of Racial Equality, of which some of these petitioners are members, has during the past several years attempted in good faith to negotiate with the plaintiff bank seeking a change in that institution's discriminatory hiring policies based upon race. The bank in answer thereto has assumed an attitude of obstinancy to CORE's position and when petitioners sought to enforce their demands through the exercise of their rights under the U. S. Constitution, plaintiff bank sought refuge in the injunctive processes of the state courts. The effect of the issuance of the restraining order by the trial court, in light of the history of the labor policies of this bank, was prohibited state action within the meaning of the 14th Amendment by a state court in furtherance of said bank's discriminatory hiring policies. And the restraining order is void. Ex Parte Virginia, 110 U.S. 339, 25 L. ED 676, American Federation of Labor vs. Swing, 312 US 321, 61 S. Ct. 568, 85 L. Ed 855. Shelley vs. Kramer, 68 S. Ct. 836, 92 L. Ed.

(c) The restraining order was void as not being responsive to the pleadings filed, NOR RESPONSIVE TO THE BOND FILED, BOTH BEING CONDITIONS PRECEDENT TO THE ISSUANCE OF THE RESTRAINING ORDER AND FAILURE OF THE COURT TO SO REQUIRE IN THIS INSTANCE IS A DENIAL OF EQUAL PROTECTION OF THE LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

The court lacked jurisdiction to issue the restraining order for want of a proper injunction bond.

Section 526.070 Mo. Statutes, 1959, provides as follows: "No injunction, unless on final hearing or judgment, shall issue in any case, except in suits instituted by the state in its own behalf, until the plaintiff, or some responsible person for him, shall have executed a bond with sufficient surety or sureties to the other party, in such sum as to the courts or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction to the parties enjoined or to any party interested in the subject matter or the controversy conditioned, that the plaintiff will abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved."

The restraining order in its outset states as follows: "Temporary restraining order ordered to issue as to all defendants individually and as representatives of a class known as Saint Louis Committee of Racial Equality."

The injunction bond as posted by the plaintiff in the case does not cover the named defendants therein "individually and as representatives of a class known as Saint Louis Committee of Racial Equality," as ordered in the restraining order.

The caption of the case names the defendants individually and as representatives of a class known as Saint Louis Committee of Racial Equality.

The allegations in paragraph three (3) and four (4) of the plaintiff's petition for injunction names defendants as "officers, members or representatives of the Saint Louis Committee of Racial Equality. "

The statute requires that the bond shall indemnify "all damages that may be occasioned by such injunction to the parties enjoined or to any party interested in the subject matter of the controversy." These above quoted provisions of the statute are not included in the bond as posted.

The Missouri Statute requiring a bond in injunction cases goes back to 1835. The bond is jurisdictional in all such cases, except those which are specifically exempted by the statute. The case of the Jefferson Bank and Trust Company, a corp., vs. Robert B. Curtis, et al., does not come within those cases excepted by the statute.

As early as 1893, the Saint Louis Court of Appeals ruled in the case of Michael Kimealy vs. Patrick M. Staed, Sheriff, reported in 55 Mo. Appeals 176, dealing with an injunction bond. In the Kimealy case a party by the name of Macklin, his wife, and a party by the name of Haydel as trustee for such wife, recovered judgment in the Supreme Court of Missouri. An injunction was issued, and bond was ordered to be posted. Additional provisions were inserted in the bond to cover individuals who were not parties to the suit. The court held in the case as follows:

"The ordinary injunction bond would have furnished no security to any person not a party to the proceeding, not interested in the subject matter or controversy."

(d) PETITIONERS IN CASES NO. 64 C 53 and 64 C 54 WERE NOT PARTIES TO THE INJUNCTION SUIT, AND THE APPLICATION OF THE LAW OF CONTEMPT TO THESE PETITIONERS IS A DENIAL OF THE EQUAL PROTECTION OF THE LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

The case of ex parte Dillon, 96 S.W. 2D 1095, decided by the Kansas City Court of Appeals is one of the leading cases in this State dealing with the sufficiency and coverage of the injunction bond under the Missouri Statutes.

This Dillon case involved Habeas Corpus proceedings on behalf of Mr. & Mrs. Harry C. Dillon. They had been found guilty and were sentenced to imprisonment in the County Jail for a definite period.

The facts briefly stated are that one Hitchcock and wife filed suit against Gow, trustee, Empire Trust Company, and Le Roy Mead, trustee in bankruptcy for the H. S. Smith Investment Company to determine the title to 45 acres of land. The Empire Trust Company filed a cross petition seeking affirmative releif, and asking for the appointment of a receiver, and for a restraining order against the plaintiffs.

The lower Court appointed Ewing as receiver and issued a restraining order against plaintiffs in the case and decreeing that the plaintiff in said action:

"And any and all persons claiming under them as tenants, lessees or successors in interest be restrained and enjoined from holding possession of said premises from said receiver and the Empire Trust Company pending the final disposition of the cause and requiring the Empire Trust Company to post a $300.00 bond to be executed to plaintiffs securing and indemnifying the plaintiffs up to $300.00."

Held - where receiver was appointed for property - which was subject of litigation - defective injunction bond which failed to indemnify persons other than parties to litigation held to invalidate injunction - and other parties could not be held in contempt for violation of injunction.

The Court held that a proper injunction bond complying with requirements of Statute is pre-requisite to issuance of an injunction.

"The bond required of the Empire Trust Company as preliminary to the issuance of the injunction (as appears from the order granting the injunction) was not in accordance with the requirements of Sectio 1507 R.S. Mo. 1929 - P. 1663). It was required to be executed only to the plaintiffs in the action in which it was given and required to indemnify only such parties against damages. It was not required to be executed to persons interested in the subject matter of the litigation who were not parties to the action. Neither was it required to indemnify such person against damages and injury."

"The petitioners were not parties to the action, but they were interested in the subject matter thereof. So far as these petitioners are concerned, the bond required does not protect or indemnify them. A proper injunction bond, complying with the requirement of the Statute, is a prerequisite to the issuance of the injunction. Without it, there is no jurisdiction to issue the injunction. From the record herein, it does not appear that any such was required or given, at least so far as the petitioners are concerned. The injunction as to petitioners cannot be enforced."

It is clear that the injunction bond in the present case does not meet the statutory requirements and is void for all purposes.

(e) The obligation of Contract was Abridged and Due Process of Law and Equal Protection of the Law were Denied to Petitioners by the Construction Placed on R. S. Mo. 1959, 526.070 in this case which is contrary to the established construction of many years' standing all contrary to Article I, Sec. 10, U. S. Constitution, and the 14th Amendment thereto.

The St. Louis Court of Appeals in its opinion and the Supreme Court of Missouri in its adoption of the opinion of the St. Louis Court of Appeals as its reason for denying petitioners' application for a writ of habeas corpus addressed to it did violence to the legislative intent, the intent of the parties, and the meaning of the restraining order issued by the trial court and thus attempted to thrust jurisdiction upon the trial court where none existed. This action by the Court abridged the obligation of the indemnity contract between the obligor Bank and its obligee surety by adding indemnities (third party beneficiaries) not contracted for by the parties and previously limited by the trial court in its restraining order "to all defendants individually and as representatives of a class known as St. Louis Committee of Racial Equality from: ***" by a judicial interpretation of R. S. Mo. 1959, Section 526.070 in violation of Article I, Section 10 of the Constitution of the United States, and a denial to these petitioners of due process of law and the equal protection of the law in vilation of the Fourteenth Amendment of the United States Constitution.

The St. Louis Court of Appeals misapplied the rule which reads into a bond the terms of the statute. This rule applies to the conditions of the bond and not the parties. 12 AM Jur 2d, 326, p. 495 (Bonds).

(f) The Missouri Supreme Court, by its failure to do its duty and to resolve the conflict between the Kansas City Court of Appeals and the St. Louis Court of Appeals on the question of the jurisdictional sufficiency of the indemnity bond denied to these petitioners the due process of law and the equal protection of the law.

The State Supreme Court had the duty to resolve the conflicting opinion of the Kansas City Court of Appeals and the St. Louis Court of Appeals in their construction of R.S. Mo. 1959, Section 526.070, and Supreme Court Rule 92.09 on the question of the jurisdictional sufficiency of the indemnity bond, and the

Supreme Court's failure to do so and the resulting imprisonment of petitioners denies to petitioners the equal protection of the law and due process of law. Contrary to the Fourteenth Amendment of the United States Constitution.

State of Mo. v. Katz Drug Co., 352 SW 2D 678 - (Dec., 1961) overruled in Fred Harvey v. Sam Priest, 366 SW 2d 324, (Mar., 1963) The Supreme Court of Missouri in the Harvey case, supra, expressly noticed in overruling themselves that they had "failed to take into account or notice that our Court of Appeals had many years ago placed a contrary construction on the language in question." (l.c. 328) The Supreme Court of Missouri had a duty imposed by the Constitution of Missouri, Art. V, S. 10, to resolve the existing conflict between inferior courts.

3. THE TRIAL COURT EXCEEDED ITS JURISDICTION TO TRY OR TO CONVICT THESE PETITIONERS FOR CRIMINAL CONTEMPT AND BY DOING SO DENIED PETITIONERS THEIR RIGHTS TO DUE PROCESS AND THE EQUAL PROTECTION OF THE LAW CONTRARY TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

a. The R.S. Mo. 1959, Sections 476.110 - 476.140 and Supreme Court Rules 35.01 and 92.15, the judgments of the trial court and the decision and judgment of the Court of Appeals have been unconstitutionally applied to these petitioners in that they were tried in a civil contempt proceeding and for a civil contempt, but have been found guilty of a criminal contempt contrary to the expressed language of Rule 35.01 and prior decisions of the Appellate Courts thereby denying to petitioners the due process of law and the equal protection of the law as provided by the Fourteenth Amendment of the United States Constitution.

The Court below imposed on petitioners sentences in the City Jail from 60 days to 270 days and fines from $500.00 to $1000.00. These sentences indicate that the Court below was treating the actions of the petitioners as criminal contempt.

A close examination of the law and facts on the face of the proceedings will reveal that the Court below was in error, and that the contempt, if any, was civil and not criminal.

The petition for injunction was filed by the Jefferson Bank and Trust Company for the purpose of enjoining the defendants therein from doing certain acts as disclosed by the prayer of the petitioners.

Thus, it is clearly seen that the purpose of the injunction suit was to protect a private right, the business of the bank, the funds on deposit and the property of the bank from the trespass, damages and injury by the petitioners herein.

The Temporary Restraining Order issued pursuant to the petition is captioned the same way the petition for injunction was styled. The whole tenor of it is designed to protect the private business and property of the Jefferson Bank and Trust Company.

The Application for Attachment is styled the same as the original cause, with the same parties, the same cause number, the same Court division. The application is by the Jefferson Bank and Trust Company. In the First, Third, Seventh, Eight and Twelfth paragraphs of the application and in the prayer will be found references to the plaintiff's private business. In Paragraph 12 of the application for citation the purpose is made clear in the following language:

> "That the acts of the herein named defendants above referred to further constitute a violation of the rights of the plaintiff herein in that said acts constitute a trespass on plaintiff's property, a complete disruption of plaintiff's business, and the said misconduct of the herein named defendants is calculated to and is intended to and does, in fact, defeat the rights and remedies of your petitioner as a plaintiff in the above entitled action and is causing actual loss and injury to this petitioner."

In the prayer of the application the bank asks for "its costs and expenses herein and in its behalf, including attorney's fees to be allowed by the Court, and why the Court should not make such other orders and give such other relief as may be just and proper in the premises."

Part of the oath to the Application for Citation or the verification is made in the following language:

> "Wayne L. Millsap, being duly sworn in his oath did say that he is the attorney for the Jefferson Bank and Trust Company a Corporation."

Thus, it is clear that the purpose of the Application for

Citation for Contempt was for the enforcement of the Temporary Restraining Order designed to protect the private rights of the Jefferson Bank and Trust Company. Nothing is said in the Application for Citation about "offenses against the majesty of the law and the dignity and authority of the Court."

The CORE cases began as civil actions by the filing of petitions by Jefferson Bank for an injunction, pursuant to Sections 526.010 and 526.030 Mo. R.S. (1959). Punishment for violation of an injunction is further prescribed in Section 526.220; such being described as a contempt. Whether the contempt is civil or criminal is not contemplated by this section, and both are included in the case annotations thereunder.

Mo. R.S. Section 476.110 of Chap. 476 dealing with all courts generally, states that, "Every court of record shall have power to punish *as for* criminal contempt persons guilty of . . ." five specific areas of conduct. Thus far, the proceedings are necessarily civil, and it must now be determined what effect *as for* has upon the contempt charge arising out of the original civil proceedings.

The phrase *as for* is not defined in standard legal dictionaries or words and phrases, but statutes containing this phrase were discussed in the following Missouri cases.

Fiedler vs. Bambrick Bros. Construction Co., 142 S.W. 1111 (St. Louis App. 1912).

a. Facts -- Plaintiff obtained an injunction against the defendant, a corporation, restraining it from blasting and performing other activities detrimental to plaintiff's property. The defendant argued that its act, the equivalent of today's 476.110(3), made it punishable for criminal contempt only and a corporation could not be punished criminally. The statute involved, Section 3881, R.S. (1909) is the same as the present Sec. 476.110.

b. Opinion -- The court said the case presented a constructive contempt, not a criminal contempt, and that Section 3881 was not the measure of the court's power to punish for contempt; that courts derive such power to punish for contempt independent of the statute and beyond the right of curtailment by the Legislature, it being essential to the maintenance of their jurisdiction.

Ex parte Heffron et al., 162 S.W. 652 (St. Louis App. 1913).

a. Facts -- Original habeas corpus proceeding to obtain the release of three defendants found guilty of violating an injunction granted in aid of the St. Louis Catering Co. for boycotting and conspiring to interfere with its business.

b. Opinion -- Section 3881, Mo. R.S. (1909) authorizes the court to punish as for criminal contempt, persons guilty of willful disobedience of any order lawfully issued or made by the court. Such is the case here, for the petitioners were convicted of contempt in that they willfully disobeyed the restraining order theretofore issued. Such contempts, even though falling within the category of civil contempts, for purposes of classification, are regarded in the law as criminal in their nature when considered under the requirements of these statutes (S3884, now 476.140) concerning the judgments and process of commitment by which the person charged is restrained of his liberty. Therefore, the finding, judgment, and the commitment of the court are strictly construed in favor of the accused. In other words, nothing is to be inferred in favor of the restraint of liberty, and presumptions and intendments will not be indulged in order to aid it. (This suggests that all existing due process requirements must be followed.)

State ex rel., etc., v. Bland, 88 S.W. 38. This case involved a conviction of contempt for violation of an injunction.

The alleged contemnors were "scalping" railroad tickets for the World's Fair held in St. Louis in 1903. The trial court convicted them of "divers" violations of the injunction.

The Supreme Court of Missouri held that although they had been prosecuted at the relation of the State and on specific notice that the contempt was civil and therefore appealable. This case is directly in conflict with the decision of the St. Louis Court of Appeals and the action of the trial court.

b. The court exceeded its jurisdiction by finding, by interpreting its findings insuch to mean that petitioners were guilty of a criminal contempt when they had been charged and tried therefor only for civil contempt (in a civil contempt proceeding) by such finding or interpretation petitions have been denied their right to appeal and thus required to remain in jail seeking a review of their conviction by a habeas proceeding and thereby denied petitioners due process and the equal protection of the law as required by the 14th Amendment to the U. S. Constitution.

"A proceeding instituted by the aggrieved party to punish the other party for the contempt for affirmatively violating an injunction in the same action in which the injunction order was issued, and praying for damages and costs, is a civil proceeding in contempt, and is part of the main action, and the Court cannot punish the contempt by imprisonment for a definite term; the only contempt punishment is by fine measured by the pecuniary injury sustained."

Gompers v. Bucks Stove & Range Co., 221 US 418, 315 Ct. 492.

There is another important difference. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not part of the original cause.

c. The pretended trial and conviction of Petitioners for criminal contempt without notice that they were being tried for criminal contempt, contrary to Missouri Supreme Court Rule 35.01, requiring the facts constituting the criminal contempt and describing it as such, with time adequately to consult with counsel to prepare a defense was a denial of due process of law and the equal protection of the law as required by the 14th Amendment to the U. S. Constitution.

The entire record of these proceedings reveals an almost indecent haste to vindicate the authority of the bank. With amazing alacrity individuals were plucked from their homes and popped in the jail and tried under a bewildering procedural system wherein now its civil, now it ain't.

_If_ the effect of Section 476.110 is to transform a civil contempt to one criminal in its nature or criminal procedurally, the effect of Mo. Sup. Ct. Rule 35.01 upon such contempts must be ascertained.

Rule 35.01 has not been interpreted by a Mo. Ct.; however, it is almost identical with Federal Rule of Crim. Proc. 42; 18 USCA 42. Interpretations of this rule with regard to due process may be argued to extend to Mo. Rule 35.01 and its application. The question would then become: Were the CORE defendants denied due process by the failure of the trial court to strictly comply with Rule 35.01?

A. The note of the Advisory Committee on rules re 42(b):

The requirement in the second sentence that the notice shall describe the criminal contempt as such is intended to obviate the frequent confusion between criminal and civil contempt proceedings and follows the suggestion made in McCann vs. New York Stock Exchange.

B. _McCann vs. New York Stock Exchange_, 80 F^2 211 (1935).

a. Facts -- Members of the stock exchange obtained an injunction restraining the defendant from circulating derogatory writings about them. The defendant continued and was tried for contempt.

b. Opinion -- It has been the custom of lower courts to resort to many elements to determine the civil or criminal character of contempt proceedings. Some purely formal, some substantial. . . . The result has been unsatisfactory and has defeated its own purpose, which was to advise the respondent at the outset of the nature of the application. A simple and certain test of the character of the prosectuion is this:

1) Prosecution by the D.A., which leaves little doubt, or

2) The judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should; but obviously, the respondent may then find it hard to tell that the prosecution is not a remedial move in the suit, undertaken on behalf of the cleint. This can be made plain if the judge enters an order directing the attorney to prosecute the respondent criminally on behalf of the court. We think that unless this is done, the prosectuion must be deemed to be civil and will support no other than a remedial punishment. Such not having been done in the instant case, the conviction must be reversed.

C. (FTC) vs. McLean and Sons, 94 F^2 802(1938). The court states that the party against whom proceedings in contempt are attempted to be had is entitled to know from the outset whether the proceedings against him are civil or criminal in their nature. The court then quotes from the McCann Case, supra.

D. (U.S.) vs. Balaban, 26 F. Supp. 491.

a. Facts -- Contempt proceedings against a motion picture syndicate for violating an injunction in restrain of trade.

b. Opinion -- This is a constructive criminal contempt and . . . with immaterial exceptions the method of criminal procedure should be adhered to in a criminal contempt proceeding.

1. Burden of proof;
2. Presumption of innocence;
3. Right against self-incrimination.

E. (U.S.) vs. Montgomery, 155 F. Supp. 633.

a. Facts -- Contempt case for violating injunction by permitting sheep to graze upon U.S. lands without a permit.

b. Opinion -- Rule 42(b) provides that a criminal contempt shall be prosecuted on notice and that the notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. Nowhere is the contempt here involved described as 'criminal.' The defendant did not enter a please, but rather filed an answer to the order to show cause. While the omission of the words 'criminal contempt' from the petition and order to show cause is not necessarily fatal to a proceeding in criminal contempt, the defendant must be aware that a criminal contempt is charged.

It may be argued that the use of the word 'punished' in the petition and order to show cause was sufficient notice to defendant that a criminal contempt was contemplated. But 'punishment' as used in contempt cases is ambiguous. Where counsel and the court have difficulty in determining whether a criminal contempt was charged, certainly it cannot be said that the defendant was aware that this proceeding was one for criminal contempt. Accordingly, it is our conclusion that the proceeding must be construed as an action for civil rather than criminal contempt.

4. The Court did not have the authority to sentence petitioners to a fixed term and to fine them in a civil contempt

proceeding under the pretension of punishing as for criminal contempt where Supreme Court Rule 35.01 had not been followed and therefore the punishment constituted a cruel and unusual punishment contrary to the Eighth and Fourteenth Amendment to the U.S. Constitution.

(1st Five)

Petitioners contend that the fines and sentences imposed by the trial court are too severe and harsh. Petitioners and their attorneys know of no other case in the United States involving the recent struggle of the Negro for freedom and dignity where a court has imposed terms up to one year in jail and fines of $1,000.00 and bail bonds in the astronomical sum of $10,000.00. In Jackson, Mississippi, during the height of the "Freedom Rides" bail was set at $500.00 and jail sentences did not exceed four months.

It is difficult to make comparison with other contempt cases. Perhaps the best analogy would be the labor difficulties of 1920 and early 1930. Comparison of the fines and imprisonment in this case and other cases in Missouri and labor disputes of 1920 and 1930 reveal the following:

State ex rel Hawkins v. Utley, 124 SW 2d 685, 1939. In this case defendant was enjoined from operating a dance hall and gambling den. Defendant continued to operate the dance hall and gamble and did shoot one Louis Howard and fire shotguns and pistols on the highway. Sentenced to three months in county jail.

Carder v. Carder, 61 SW 2D 388. Here plaintiff and his attorney served divorce papers on a woman they had hired to represent herself as plaintiff's wife. The attorney was fined $50.00 and sentenced to 90 days in jail.

State v. Norman, 193 SW 2d 391. Attorney had a client charged with grand larceny and attorney told his client that he did not have to appear in court. Client's bond was forfeited, etc. Attorney was fined $100.00.

Osborne v. Purdome, 250 SW 2d 159. In this case an attorney had attempted to bribe a juror through a man by the name of Matt Jones. Jones after giving some testimony disappeared in the River loaded with chains. The attorney surrendered his license to practice. On a finding of guilt he was sentenced to 10 months and $1,000.000 fine.

Carey et al. v. District Court of Jasper County, et al., 285 NW 236. In this case a temporary injunction was issued and one day later Union seized plant on sit-down. Union officers were fined $500.00 and sentenced to six months. On appeal this was held to be excessive.

Ex Parte Partenbury, 101 P 2d 105. Union case. Union was enjoined from picketing, but continued to do so. Plaintiffs were fined $5.00 or one day in jail.

Busch Jewelry Co., Inc., et al., v. Silvers, et al., 8 NYS 2d 592. Union Case. In this instance defendants violated an injunction against picketing. The case involved violent, abusive conduct on the part of the pickets and interfered with the business of the company. Two union officers received 30 days and $250.00 fine and the nine members received ten days and no fine.

Fansteel Metallurgical Corp. v. Lodge 60, 14 NE 2d 991. Another Union case. In this situation the employees had occupied the buildings of the employer, and the company obtained a temporary injunction. The Sheriff tried to evict the workers and was met with sulphuric acid, streams of water and a barrage of thrown articles. Thirty-nine persons were found guilty. Twenty-four received $100.00 fine and ten days in jail. Four officers of the union received fines from $300.00 to $1,000.00 and jail terms of 180 to 240 days.

Petitioners contend that under the above cases the sentences and fines imposed by the lower court are excessive and constitute cruel and unusual punishment in violation of the constitutional rights.

e. The court violated petitioners right not to be compelled to testify against themselves in a criminal proceeding by making the change from civil to criminal contempt after depositions were taken and permitted selected portions of the depositions to be read into evidence as admissions against interest over petitioners' objections, contrary to the 5th and 14th Amendments of the United States Constitution.

"In another most important pabticular the parties clearly indicated that they regarded this as a civil proceeding. The complainant made each of the defendants a witness for the bank, and as such, each was required to testify against himself, a thing that most likely would not have been done or suffered, if either party had regarded this as a proceeding at alw for criminal contempt, because the provision of the Constitution that "no person shall be compelled in any criminal case to be a witness against himself" is applicable, not only to crimes, but also to quasi criminal and penal proceedings." Boyd vs. U.S., 116 (U.S. 616). Gompers v. Bucks Store and Range Co., 31 S. Ct. 492.

f. The evidence in the record shows that the plaintiff bank went to great lengths and made elaborate preparations for doing business on October 7, 1963. It set up a special window, Number 10, for making change, for which it exacted a charge of 25¢ per transaction; it posted various signs in and about the premises; installed a public address system, manned and working, and, in addition thereto, locked its doors and stationed an employee at its front entrance to handpick the persons with whom it wished to do business. Thus did petitioners Michela Grand, James Peake, Jr., and Daniel Pallock gain entrance to plaintiff bank's premises. They approached Window Number 10, transacted business, and paid the service charge. There were handpicked invitees, who were entrapped by plaintiff bank and police authorities to come in, only to be arrested for trespass, pease disturbance, and an ultimate charge of violating a court order. They were in the premises with the consent of bank officials and their ultimate arrest under the above circumstances was a denial of due process and equal protection of the law as afforded other patrons of the plaintiff bank.

g. Insufficiency of Findings of Fact and Judgments and Commitment Orders on Their Face

It is a well settled principle of law in Missouri, by both statute and decisions of the courts, that in contempt of court proceedings the findings of fact upon which the judgment of guilty and the commitment order are based must recite the facts and circumstances constituting the offense with great particularity in order to be effective to coerce, or to punish the contemnor for his violation of the court's order. (Rule 35.01; Section 476.140 R. S. Mo. 1959; Glenn vs. Hendrix, 349, S.W. 2d 532, and cases therein cited). The principle is well stated in Ex parte Fuller, 50 S.W. 2d. 654, 647, as follows:

> ". . . In contempt proceedings which result in detention of one's liberty, the law says that the facts and circumstances of the contumacious acts must be spread of record in the commitment or order of committment. Such was not done here and petitioners' legal rights have been invaded. . . ."

The specific facts upon which the conslusions or fact or law are based must be "found" by the court and spread upon the record of the court in its Findings of Fact and Commitment Order. A court of general jurisdiction can only speak through its records. (Odom v. Langston, 213 S.W. 2d 948, 950). It goes without saying that where its records are silent, it says nothing; and where its records are erroneous, it does not tell the truth. Supreme Court Rule 35.01, which controls the procedure in criminal contempt, provides, in the last sentence, that ". . . upon finding a guilt the courts shall enter an order reciting the essential facts constituting the criminal contempt and fixing punishment."

The pertinent statute, Section 476.140 R.S. [illegible]. 1959, provides:

> "Whenever any person shall be committed for any contempt specified in Section 476.010 to 476.310, the particular circumstances of his offense shall be set forth in the order or warrant of commitment."

The construction of these sections has been most amply stated as follows:

> "Our appellate courts have held repeatedly that in a contempt proceeding, that facts and circumstances constituting the offense, and not simply legal conclusions, must be recited not only in the judgment. . . but also in the commitment, regardless of whether the charged contempt is direct, i.e., arising out of conduct or action in the presence of the court. . . or, as here, as indirect, i.e., arising out of conduct or action outside the presence of the court. . . ." Glenn v. Hendrix, 349 SW 2d 532, 533. See also, Osborne v. Purdome, 244 SW 2d, 1005, 1011, citing Section 476.140, R.S. Mo. 1949).

In the present case (Jefferson Bank and Trust Co. vs. Curtis et al.) the record before this court is silent as to the facts found by the trial court upon which it concluded that these petitioners were guilty of criminal contempt and should be punished by commitment and fine; and is silent on the particular facts to justify the length of the commitment and the amount of the fine.

Even a cursory examination of the Findings of Fact and Judgment and the Commitment Orders clearly demonstrates the errors of the Court's ways.

First. The Court, in making its formal findings as evidenced from the record proper, completely refused to make (and even ignored to mention) any findings on the controversial issues of procedural and substantive due process raised by petitioners' motions, timely made and argued during the trial and kept alive throughout. Even though the Court's jurisdiction was questioned time and time again, the Court does not even find that it had jurisdiction.

Second. Further, a cursory examination disclosed that in makings its findings of fact, the Court merely copies the language of the complainant in the motions filed for the contempt citations.

Third. Examination further shows that the court adopted four (4) patterns for making its findings, two (2) for the first nine, with Charles R. Oldham, Marian Oldham, Raymond Howard, and Herman Thompson, following one pattern; and the other five following another pattern; one pattern for all of the Second Seven; and two (2) patterns for the Third Three. In the last two cases (the Second Seven and the Third Three) the wording is identical. However, there is no doubt that the evidence is different.

Fourth. A reading of the Court's Findings of Fact and Judgments, and Commitment Orders, state such general conclusions that it is impossible to know with particularity what specific facts are relied upon to formulate the charges, what specific facts are relied upon to prove the charges, and what specific facts are relied upon to assess the punishments. As such, the Findings of Fact and Judgments, and the Commitment Orders are fatally defective and legally insufficient to serve the purpose for which they are intended. (Scott v. Davis, 328 SW 2d 394, 396). Although the Court in the well-documented Scott case, had before it a case of direct contempt, it was construing Section 476.140 R.S. Mo. 1959, which is controlling on the point involved here. At Page 396 (1-3), the court states as follows:

> "Since the purpose of such a proceeding is to punish, it takes on some of the attributes of a criminal case, and by the great weight of authority, with which the courts of this state agree, the 'particular circumstances' must be set forth in the order in such manner as to show the actual facts (sometimes called the "concrete facts") as they transpired, not simply the conclusions of the sentencing judge, not even the ultimate facts when it is possible to state the constituent and component facts and circumstances which make up the offense. The judgment or order of commitment is construed strictly in favor of the accused in this respect; and no inferenses, presumptions, or intendments are to be indulged in order to aid the statement of charges found against the accused." (Emphasis the Court's.)

Further, on the same page, the Court stated that the facts should be set forth "with sufficient particularity that another or superintending court can from reading such judgment determine therefrom, without resort to inquiry, intendment, inference or presumption, whether they constitute contempt."

Petitioners submit that this Court should be able to read the Findings of Fact and Judgments, and Commitment Orders of the trial court and make, at least, a prima facie determination on the legality of the restraint. This cannot be done in the instant case, and these petitioners must be discharged.

Neither the protection of the innocent, nor the punishment of the guilty, can be left to change or the personal whims of the judge or the prosecutor. In a well-reasoned contempt case, where the pulbic interest in the welfare of a neglected child and due process of law were involved the Court, in G   v. Souder, 305 SW 2d, 2d 883, 997, stated:

> ". . . But judges, 'likened unto priests attending between the horns of the altar in the Temple of Justice,' must not permit their concern for the welfare of neglected children (proper and necessary as such concern is) to result in disregard or neglect of their solemn charge to keep 'the lamp of personal liberty in oil, well trimmed, and brightly burning,' for 'the liberty of the citizen is an immediate jewel of the law to be sacredly cherished and hedged about withal.'"

Due process and the equal protection of the laws are the cornerstones of the administration of justice throughout the breadth of the United States and where the liberty of any one individual is illegally taken, the liberty of all suffers as a result thereof.

h. The appointment of Wayne Millsap as the "Special Prosecutor" deprived the petitioners of a fair and impartial trial.

The petitioners are entitled to a fair and impartial trial, conducted by a prosecutor primarily interested in seeing that justice is done, and not merely interested in securing a conviction. A prosecutor is a quasi-judicial officer, who is required to perform his duties without bias or prejudice, whose first duty is to the people of the State, and not to any particular class or group. State v. Bowenkampt, 39 SW 2d 753.

Certainly, no one should serve as a prosecutor when he has a personal interest in the outcome of a trial, so that the conviction means a personal victory or profit or reward for himself or his clients. And yet, in this case, that is exactly the situation when the attorney for one of the party litigants is now given the formidable weapon of being named prosecutor for the Court against his opponents. In addition to being an adversary, he is now clothed with the quasi-judicial role of representing the court, and thereby the people of the community, and is afforded carte blanche to destroy his opposition, by serving as counsel for his own cleint, and prosecutor in behalf of the very judge who is to decide the case.

Mr. Millsap filed the original pleading for injunctive relief in behalf of the plaintiff Jefferson Bank. He drafted and filed a citation for personal and private relief for his client in his citation for Civil Contempt. He aided in the midnight arrest of nine alleged contemnors. Under the guise of civil proceedings he personally deposed each of the nine arrested defendants. And then after all of this partisan activity, he is appointed by the Court to serve as "Special Prosecutor" to avenge the majesty of the law and the dignity and authority of the Court.

Missouri, like most of our sovereign states, frowns upon the appointment of special prosecutors, generally. State v. Bockman, 253 SW 2d 607. Indeed the statutes of the state provide that the regular prosecutor may be relieved of his responsibilities if, in a particular case, he is not totally impartial, and without special interest. Rev. Statutes of Mo. Sec. 56.110 provides as follows:

> If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of

> his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause.

While it is true that this statute pertains to the general qualifications of the regular prosecuting officials, and not specially to prosecutors in contempt cases, nonetheless, it clearly indicates the public policy of the Legislature and of the Courts, and is even more controlling because the Court could, and we submit, should, have appointed someone else to serve as prosecutor in these cases. Indeed, almost any other member of the Bar would have been a more logical appointment than Mr. Millsap, and the petitioners, after duly objecting to this appointment, specifically requested the Court to make such alternative appointment, all to no avail.

It is urged by the petitioners that the trial court, by the appointment of Wayne Millsap, deprived them of a fair and impartial trial and violated their Constitutional rights, under the 'due process and equal protection of the law' clauses of the 14th Amendment of the Constitution of the United States. As examples of the inevitable passion and prejudice of Mr. Millsap in the performance of his duties as special prosecutor are: the midnight arrests and holiday week-end detention of the first nine petitioners, the excessive bail of $10,000.00 (more than twice the highest amount fixed by this Court of Appeals after conviction), the selection of only certain carefully selected individuals to be defendants, and the use of other potential defendants as witnesses for the prosecution, even though all plaintiff's evidence showed those witnesses to be the most active participants in the demonstration, the full use of the agencies of the State, the police photographers, etc., to vindicate the private rights of the bank, the precipitous haste in pressing for immediate trial, after the arrest of the second group of defendants with no opportunity for counsel to adequately prepare a defense, and his attempt to intimidate and coerce by threats of imprisonment and then promises of immunity to a sixteen-year-old girl, who is a member of the class named as defendants in the suit for injunctive relief, all indicate the complete lack of due process which is almost an inevitable consequence of the appointment of a prosecutor with such obvious conflicts of interest.

Manifestly, the appointment of such a necessarily biased and partial prosecutor could have but one effect, the deprival of a fair trial and due process of the law.

CONCLUSIONN

By reason of the foregoing, Petitioners' restraint is illegal and contray to the provisions of the Constitution of the United States of America and the Writ of Habeas Corpus should issue and the petitioners discharged.

PART TWO

SUMMARY OF THE ARGUMENT

1. THE JURISDICTION OF THE U.S. DISTRICT COURT IS PLENARY

   a. The Statutory Authority

   b. The Scope of Investigation

   c. The Particular Judgment

2. THE TRIAL COURT WAS WITHOUT JURISDICTION TO ISSUE ITS RESTRAINING ORDER AND TO TRY AND CONVICT THESE PETITIONERS FOR A CRIMINAL CONTEMPT: AND THE FAILURE OF THE TRIAL COURT TO REFRAIN FROM DOING SO, WAS A DENIAL OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW CONTRARY TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

a. Labor Dispute Existed within meaning of N.L.R.M. Act and STATE AUTHORITY WAS (IS) SEVERELY LIMITED.

b. The State Court could not by its injunctive powers enforce the racial discriminatory hiring policy of any private or public agency.

c. The restraining order was void as not being responsive to the pleadings filed, NOR RESPONSIVE TO THE BOND FILED, BOTH BEING CONDITIONS PRECEDENT TO THE ISSUANCE OF THE RESTRAINING ORDER AND FAILURE OF THE COURT TO SO REQUIRE IN THIS INSTANCE IS A DENIAL OF EQUAL PROTECTION OF THE LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

d. Petitioners in cases No. 64C53 & 64C54 WERE NOT PARTIES TO THE INJUNCTION SUIT, NOR COVERED BY THE RESTRAINING ORDER, NOR COVEREX BY THE BOND, AND THE APPLICATION OF THE LAW OF CONTEMPT TO THESE PETITIONERS IS A DENIAL OF THE EQUAL PROTECTION OF THE LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

e. The obligation of Contract was Abridged and Due Process of Law and Equal Protection of the Law were Denied to Petitioners by the Construction Placed on R. S. Mo. 1959, 526.070 in this case which is contrary to the established construction of many years standing, all contrary to Article I, Sec. 10, U. S. Constitution, and the 14th Amendment thereto.

f. The Missouri Supreme Court, by its failrre to do its duty and to resolve the conflict between the Kansas City Court of Appeals and the St. Louis Court of Appeals on the question of the jurisdictional sufficiency of the indemnity bond denied to these petoners the due process of law and the equal protection of the law.

3. THE TRIAL COURT EXC#EDED ITS JURISDICTION TO TRY OR TO CONVICT THESE PETIONERS FOR CRIMINAL CONTEMPT AND BY DOING SO DENIED PETITIONERS THEIR RIGHTS TO DUE PROCESS AND THE EQUAL PROTECTION OF THE LAW CONTRARY TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

a. The R. S. Mo. 1959, Sekcions 476.110-476.140 and Supreme Court Rules 35.01 and 92.15, the judgments of the trial court and the decision and judgment of the Court of appeals have been unconstitutionally applied to these petioners in that they were tried in a civil contempt proceeding and for a civil contempt, but have been found guilty of a criminal contempt contrary to the expressed language of Rule 35.01 and prior decisions of the Appellate Courts thereby denying to petitioners the due process of law and the equal protection of the law as provided by the Fourteenth Amendment of the United States Constitution.

b. The court exceeded its jurisdiction by finding, by interpreting its findings in such a way or to mean that petitioners were guilty of a criminal contempt when they had been charged and tried for only civil contempt (in a civil contempt proceeding) by such finding or interpretation petitioners have been denied their right to appeal and thus required to remain in jail while seeking a review of their convictionlby a habeas proceeding and thereby denied petitioners due process and the equal protection of the law as required by the 14th Amendment to the U. S. Constitution.

c. The pretended trial and conviction of Petitioners for criminal contempt without notice that they were being tried for criminal contempt contrary to Missouri Supreme Court Rule 35.01 r requiring the facts constituting the criminal contempt and describing it as such, with time adequately to consult with counsel and prepare a defense was a denial of due process of law and the equal protection of the law as required by the 14th Amendment to the U. S. Constitution.

d. The Court did not have the authority to sentence petitioners to a fixed term and to fine them in a civil contempt proceeding under the pretension of punishing as for criminal contempt where Supreme Court Rule 35.01 had not been followed and therefore the punishment constituted a cruel and unusual punishment contrary to the Eight and Fourteenth Amendment to the U. S. Constitution.

e. The Court violated petitioners right in case No. 64 C 52 not to be compelled to testify against themselves in a criminal proceeding by making the change from civil to criminal contempt after depositions were taken and permitted selected portions of the depositions to be read into evidence as admissions against interest over petitioners objections contrary to the 5th and 14th Adendments of the U. S. Constitution.

f. The State through its Courts nor its police department can become the tool of any person or agency for the purpose of entrapment and the consequent charging of these petitioners with contempt when they were business invitees is a denial of due process of law and the equal protection of the law contrary to the 14th Amendment of the U. S. Constitution.

g. THE FINDINGS OF FACT AND COMMITMENT ORDERS ARE LEGALLY INSUFFICIENT ON THEIR FACE AND THUR CONSTITUTE A DENIAL OF DUE PROCESS AND EQUAL PROTECTION.

h. The appointment of Wayne Millsap as the "Special Prosecutor" deprived the petitioners of a fair and impartial trial. (Applies to cases No. 64 C 52 & 64 C 54.)

SEDFRE

FINDLEY, CHRISTINE, BROWN, VS. NYACK, NEW YORK 1965-1967
(HOUSING DISCRIMINATION)

Box 36
Folder 26

State Historical Society Of Wisconsin

Please Retain Original Order

Personal or Substituted Service.

EXCHANGE PLACE AT BROADWAY, NEW YORK

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND

CHRISTINE BROWN FINDLEY,

Plaintiff

against

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, ROCCO LOGIODICE, HEZEKIAH H. EASTER, and JOSEPH GUERRIERI, Trustees of said Village,

Defendant **s**

Index No.

Plaintiff designates **Rockland** *County as the place of trial*

The basis of the venue is **plaintiff's residence**

Summons

Plaintiff resides at **Nyack, N.Y.**

County of **Rockland**

To the above named Defendant **s:**

You are hereby summoned *to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within* **20** *days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.*

Dated, **April 1st, 1966.**

KOPALD, HAFT & MANDEL
Attorney(s) for Plaintiff
Office and Post Office Address
176 Main Street
Highland Falls, New York 10928
Tel. HI 6 - 4764

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ORANGE

--x

CHRISTINE BROWN FINDLEY,

Plaintiff,

-against-

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, ROCCO LOGIODICE, HEZEKIAH H. EASTER, and JOSEPH GUERRIERI, Trustees of said Village,

Defendants.

--x

Plaintiff, complaining of the defendants by Kopald, Haft & Mandel, her attorneys, respectfully alleges,

1. That the plaintiff at all times hereinafter mentioned was and now is a resident and duly qualified elector of the Village of Nyack, New York, and an owner of real property situate in the Village of Nyack, New York, consisting of a house and lot known and designated upon the assessment roll of said village as No. 160 Burd Street; that such realproperty so owned by the plaintiff was at such times and now is duly assessed upon the assessment roll of said village in a sum in excess of $1,000.00, and the plaintiff is liable to pay taxes upon such assessment to the Village of Nyack.

2. That the defendant, Warren D. Knapp, herein was at all times hereinafter mentioned and now is the duly qualified and acting mayor of the Village of Nyack, New York. That the defendants, Alexander Caglione, Rocco Logiodice, Hezekiah H. Easter, and Joseph Guerrieri were then and now are the trustees of said village.

3. That on or about the 13th day of January, 1966, the defendant Mayor and Trustees of said Village of Nyack, acting as a Board of Trustees and constituting the Finance Board of the Village within the meaning of the Local Finance Law of the State of New York, did pass a bond and capital note

resolution dated January 13, 1966, authorizing the issuance and sale of serial bonds and capital notes of the said Village of Nyack in a maximum amount of $40,000.00 for the purpose of purchasing certain fire fighting equipment, to wit; an emergency rescue fire truck for the use of the Village of Nyack Fire Department through and by one of its constituent companies.

4. That pursuant to the statutes in such cases made and provided, the aforesaid resolution was subject to a permissive referendum and pursuant to statute, defendants, upon their own motion caused the said resolution to be submitted for approval by the electors of the said village. Thereupon, a proposition was prepared and submitted at a referendum election duly called and held in the Village of Nyack on the 15th day of March, 1966.

5. Following the holding of the referendum election aforesaid, a certificate of election upon the proposition was filed certifying the approval of said proposition.

6. That thereafter on the 18th day of March, 1966, the aforesaid resolution together with the certificate in form provided by the Local Finance Law of the State of New York, was published in the Rockland County Journal News, the official newspaper of the said Village of Nyack, and this action is commenced within twenty (20) days from the date of said publication.

7. That the Fire Department of the Village of Nyack is a public municipal agency of the defendant Village of Nyack.

8. That there are no Negro members of the said Fire Department or its constituent companies, nor upon information and belief, has there ever been a Negro member of said Fire Department or its constituent companies.

9. That the said Village of Nyack Fire Department and its constituent companies have adopted and do willfully and deliberately maintain systems and procedures whereby members of the Negro race, otherwise duly qualified to become members of the said Fire Department or its constituent

companies are prevented and prohibited from becoming such members solely by reason of their color or race.

10. That upon information and belief, about 30% of the population of the Village of Nyack are members of the Negro race and among said 30%, there are several Negroes who could or would become members of the said Village Fire Department or its constituent companies, except for the discriminatory practices in the admission of members set forth above.

11. That by reason of the foregoing, the Negro residents of the Village of Nyack have been deprived and are deprived of their rights to become members of the said Fire Department and its constituent companies solely by reason of their color or race and in violation of the Statutes of the State of New York, the Constitution of the State of New York, and the Constitution of the United States of America.

12. That by reason of the foregoing, the aforesaid bond and capital note resolution, its approval at the special election aforesaid and the serial bonds to be issued as provided for in the aforesaid bond and capital note resolution are and will be invalid, illegal, unconstitutional and void, in that

(a) they will require the use of public funds in the repayment of said bonds and capital notes for the furtherance of the purposes of a public agency which discriminates in itsmembership solely on the basis of a person's color or race,

(b) They require the plaintiff and other Negro taxpayers of the Village of Nyack to bear a proportionate burden of the repayment of said bonds and capital notes for the purposes of said fire department and its constituent companies while denying to the Negro taxpayers of the Village of Nyack the right to participate as members of said Fire Department and constituent companies solelyby reason of their color or race.

(c) That such obligations were authorized for an object or purpose for which the defendant village is not authorized toexpend money.

(d) That such obligations are authorized in violation of the statutes of the State of New York, the applicable provisions of the Constitution of the State of New York, and the applicable provisions of the Constitution of the United States of America.

13. That the plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment annulling and setting aside the aforesaid bond and capital note resolution and the special election of the Village of Nyack held on March 15th, 1966 pursuant thereto, restraining and enjoining the defendants and each and every one of them from the issuance of the capital notes and serial bonds pursuant to the aforesaid bond and capital note resolution and for such other and further relief as to the Court may seem just and proper, altogether with the costs and disbursement of this action.

KOPALD, HAFT & MANDEL
Attorneys for Plaintiff
Office & P. O. Address
176 Main Street
Highland Falls, New York

STATE OF NEW YORK)
: ss.:
COUNTY OF ROCKLAND)

CHRISTINE BROWN FINDLEY, being duly sworn, deposes and says that she is the Plaintiff in this action; that she has read the foregoing Complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.'

Christine Brown Findley

Sworn to before me this 4th
day of April, 1966.

Notary Public

SUPREME COURT : ROCKLAND COUNTY
---x

CHRISTINE BROWN FINDLEY, on behalf of
herself and all other Negro property owners in
the Village of Nyack, Rockland County, New York,
similarly situated,

Plaintiffs,

-against-

THE VILLAGE OF NYACK, NEW YORK,
WARREN D. KNAPP, as Mayor, and
ALEXANDER CAGLIONE, ROCCO LOGIODICE,
HEZEKIAH H. EASTER, and JOSEPH
GUERRIERI, Trustees of said Village,

Defendants.
---x

NOTICE OF APPEAL

Index # 1518/1966

SIRS:

PLEASE TAKE NOTICE that the above named plaintiff hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from a judgment entered in the above entitled action in the Office of the Clerk of the County of Rockland on the 29th day of July, 1966, and from an order entered in the above entitled action in the Office of the Clerk of the County of Rockland on the 28th day of July, 1966, and from each and every part of said judgment and order.

Dated: August 26, 1966.

CARL RACHLIN, ESQ.,
Attorney for Plaintiff,
Office & P. O. Address
150 Nassau Street
New York City, New York

TO: Clerk of the County of Rockland,
County Courthouse
New City, New York

TO: SAMUEL MILLER, of Counsel,
GERALD R. KANE,
Attorney for Defendants,
Office & P. O. Address
90 New Main Street
Haverstraw, New York

D

7450

[Same text]

SUPREME COURT: ROCKLAND COUNTY
--x
CHRISTINE BROWN FINDLEY, on behalf of
herself and all other Negro property
owners in the Village of Nyack, Rockland
County, New York, similarly situated,

Plaintiffs,

-against-

JUDGMENT

Index No. 1518-1966

THE VILLAGE OF NYACK, NEW YORK,
WARREN D. KNAPP, as Mayor, and
ALEXANDER CAGLIONE, ROCCO LOGIODICE,
HEZEKIAH H. EASTER, and JOSEPH
GUERRIERI, Trustees of said Village,

Defendants.
--x

A motion having been made by the defendants, at a Special Term of the Supreme Court held in and for the County of Rockland for an order dismissing the complaint herein on the ground that it fails to state facts sufficient to constitute a cause of action, and the said motion having been granted and an order having been duly made by Mr. Justice James W. Bailey and entered in the Office of the Clerk of the County of Rockland on the 28th day of July, 1966, granting said motion and directing the entry of judgment,

It is on motion of Samuel Miller, Esq. of counsel for Gerald R Kane, Esq., attorney for the defendants,

ADJUDGED that the complaint in this action be and the same hereby is dismissed.

DATED: July , 1966.

AUGUST H. HANSEN
Clerk
By Edith M. Smith
Deputy Clerk

NOTICE OF ENTRY

Sir :- Please take notice that the within is a *(certified)* true copy of a judgment duly entered in the office of the clerk of the within named court on July 29th, 1966.

Dated, July 29, 1966.

Yours, etc.,

SAMUEL MILLER of counsel
Attorney for GERALD R. KANE
Defendants
Office and Post Office Address
Ninety New Main Street
HAVERSTRAW, NEW YORK 10927

To Kopald, Haft and Mandel,
Attorney(s) for Plaintiffs

NOTICE OF SETTLEMENT

Sir :- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
M.

Dated,

Yours, etc.,
SAMUEL MILLER
Attorney for
Office and Post Office Address
Ninety New Main Street
HAVERSTRAW, NEW YORK 10927

To

Attorney(s) for

Index No. 1518 Year 1966

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

CHRISTINE BROWN FINDLEY, on behalf of herself and all other Negro property owners in the Village of Nyack, Rockland County, New York, similarly situated,

Plaintiff,

-against-

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, et al

Defendants.

JUDGMENT

GERALD R. KANE
X~~SAMUEL MILLER~~X
Attorney for Defendants
SAMUEL MILLER, of counsel
Office and Post Office Address, Telephone
Ninety New Main Street
HAVERSTRAW, NEW YORK 10927
429-5371

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

Attorney(s) for

1500-©1963, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

At a Special Term of the 25th
Supreme Court held in and
for the County of Rockland
at the County Courthouse in
New City, on the 25th day of
July, 1966.

PRESENT:
HON. JAMES W. BAILEY, Justice

--x
CHRISTINE BROWN FINDLEY, on behalf of
herself and all other Negro property
owners in the Village of Nyack, Rockland
County, New York, similarly situated,

Plaintiffs,

-against-

THE VILLAGE OF NYACK, NEW YORK,
WARREN D. KNAPP, as Mayor, and
ALEXANDER CAGLIONE, ROCCO LOGIODICE,
HEZEKIAH H. EASTER, and JOSEPH
GUERRIERI, Trustees of said Village,

Defendants.
--x

4

ORDER

Index No. 1518-1966

The defendants having moved this court for judgment dismissing the complaint, pursuant to Rule 3211 of the Civil Practice Law and Rules, upon the grounds that it fails to state facts sufficient to constitute a cause of action, and the said motion having regularly come on to be heard.

Now, upon reading and filing the notice of motion, dated the 13th day of May, 1966, and the affidavits of Natalie S. Berne and Samuel Miller, both sworn to the 13th day of May, 1966, and the copy of the complaint thereto annexed, with proof of due service thereof, all of which were submitted by the defendants in support of this motion; and upon reading and filing the affidavit of Myron I. Mandel, sworn to the 6th day of June, 1966, in opposition to the motion; and upon reading and filing the affidavit of Samuel Miller, sworn to the 17th day of June, 1966, in reply to the affidavit in opposition to the motion; and after hearing Samuel Miller, Esq. of Counsel for Gerald R. Kane, Esq., Attorney for the defendants, in favor of the said motion, and Myron I. Mandel, Esq., a member of the firm of Kopald, Haft and Mandel, Esqs., Attorneys for the plaintiff, in opposition thereto, and due deliberation having been had, and the decision of the Court having been filed, and on motion of Samuel Miller, Esq. of Counsel for Gerald R. Kane, Esq., Attorney for the defendants, it is

ORDERED that the said motion be and the same hereby is in all respects granted; and it is further

ORDERED thatthe complaint in this action be dismissed and that a judgment dismissing the said complaint, with costs and disbursements to be taxed, be entered by the Clerk of this court.

ENTER

HON. JAMES W. BAILEY, JUSTICE
J.S.C.

NOTICE OF ENTRY

Sir :- Please take notice that the within is a *(certified)* true copy of an Order duly entered in the office of the clerk of the within named court on July 28, 1966

Dated, July 28, 1966.

Yours, etc.,

SAMUEL MILLER of Counsel
Gerald R. Kane
Attorney for Defendants
Office and Post Office Address
Ninety New Main Street
HAVERSTRAW, NEW YORK 10927

To Kopald, Haft and Mandel
Attorney(s) for Plaintiffs

NOTICE OF SETTLEMENT

~~Sir :- Please take notice that an order~~

of which the within is a true copy will be presented for settlement to the Hon. James W. Bailey

one of the judges of the within named Court, at his chambers, No. 138 Main Street, Cold Spring, New York on the 15th day of July 1966 10:00 A.M.

~~Dated, July 7, 1966~~

Yours, etc.,

SAMUEL MILLER of counsel
GERALD R. KANE
Attorney for Defendants
Office and Post Office Address
Ninety New Main Street
HAVERSTRAW, NEW YORK 10927

To Kopald, Haft & Mandel, Esqs.
Attorney(s) for Plaintiff

Index No. 1518 Year 1966

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

CHRISTINE BROWN FINDLEY, on behalf of herself and all other Negro property owners in the Village of Nyack, Rockland County, New York, similarly situated,

Plaintiffs,

-against-

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, et al,

Defendants.

O R D E R

GERALD R. KANE
~~SAMUEL MILLER~~
Attorney for Defendants
SAMUEL MILLER of counsel
Office and Post Office Address, Telephone
Ninety New Main Street
HAVERSTRAW, NEW YORK 10927
429-5371

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

....

Attorney(s) for

1500—©1963, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

SUPREME COURT : ROCKLAND COUNTY

- - - - - - - - - - - - - - - - - - -X

CHRISTINE BROWN FINDLEY, on behalf
of herself and all other Negro pro-
perty owners in the Village of Nyack,
Rockland County, New York, similarly
situated,

Index No. 1518-1966

Plaintiff,

-against-

THE VILLAGE OF NYACK, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - -X

JAMES W. BAILEY, JUSTICE

Defendants move pursuant to CPLR 3211 for judgment dismissing the complaint upon the ground that it fails to state facts sufficient to constitute a cause of action. An Answer not having been served, all of the facts alleged are deemed to be true.

The action is brought by one Christine Brown Findley on behalf of herself and all other Negro property owners of the Village of Nyack, Rockland County, N. Y. similarly situated. In essence, the complaint alleges that plaintiff is a resident and duly qualified elector of the Village of Nyack, and is the owner of real property assessed on the Village rolls in excess of $1,000.00; that plaintiff is a member of a class, to wit, Negro property owners in the Village of Nyack; that on January 13, 1966, the defendants Mayor and Trustees of the Village acting as a Board of Trustees and constituting the Finance Board of the Village, passed a bond and capital note resolution dated January 13, 1966, authorizing the issuance and sale of serial bonds and capital notes of the Village in the maximum amount of $40,000.00 for the purpose of purchasing certain fire fighting equipment; that defendants of their own motion caused the resolution to be submitted to a permissive referendum at an election held on March 15, 1966; that thereafter a Certificate of election upon the proposition was filed certifying the approval of the proposition; that on March 18, 1966, the resolution and Certificate were published, and the present action commenced within twenty days from the date of publication.

The complaint further alleges that the Fire Department of the Village of Nyack is a public municipal agency of the defendant, Village of Nyack; that there are no Negro members of the Fire Department or its constituent companies; that the Village Fire Department and its constituent companies have adopted discriminatory practices whereby members of the Negro race, otherwise qualified, are prevented from becoming members solely by reason of their color or race; that about 30% of the population of the Village of Nyack are members of the Negro race, and among said 30% there are Negroes who have attempted to and could or would become members of the Village Fire Department or its constituent companies, except for the discriminatory practices in admission of members; that by reason of the foregoing the Negro residents of the Village of Nyack have been deprived of their rights to become members of the Fire Department in violation of the State and Federal Constitutions and statutes.

The complaint further alleges that the bond and capital note resolution, its approval at the special election and the serial bonds to be issued are and will be invalid, illegal, unconstitutional and void in that:- (a) The funds obtained from the sale of the bonds and notes are directly and indirectly supporting and maintaining a discriminatory public or municipal agency, to wit, the Village of Nyack Fire Department. (b) They will require the use of public funds in the repayment of said bonds and capital notes for the furtherance of the purposes of a public agency which discriminates in its membership solely on the basis of color or race. (c) They require the plaintiff and other

Negro taxpayers of the Village to bear a proportionate burden of the repayment of said bonds and capital notes for the purposes of said fire department while denying to Negro taxpayers the right to participate as members of the Fire Department by reason of their color or race. (d) That such obligations were authorized for an object or purpose for which the defendant village is not authorized to expend money. (e) That such obligations are authorized in violation of State and Federal Constitutions and statutes.

The complaint alleges that there is no adequate remedy at law, and demands judgment annulling and setting aside the bond and capital note resolution and the special election. Additionally, thecomplaint seeks injunctive relief restraining and enjoining defendants from the issuance of the capital notes and serial bonds, etc., unless a fair and equitable plan of desegregation has been approved by the court.

In support of the motion, defendants contend that plaintiff does not have legal standing to bring a representative action; that the complaint purporting to allege a cause of action under Section 51 of the General Municipal Law is legally insufficient in that such an action lies only when the acts complained of are fraudulent or a waste of public property, and no such facts are alleged, nor is the requisite bond filed; and finally, that the complaint is legally insufficient to allege a cause of action under Sections 82 and 83 of the Local Finance Law.

Plaintiff on the other hand asserts that the complaint is not predicated on Section 51 of the General Municipal Law, but is grounded in Sections 82 and 83 of the Local Finance Law in which type of action the filing and service of a bond are not a prerequisite.

The complaint challenged herein may not withstand challenge whether considered as a complaint under the General Municipal Law or the Local Finance Law.

It is the considered opinion of this court that plaintiff does not have standing to bring the present representative action. The plaintiff in the peculiar circumstances has standing only to complain of grievances to which she individually has been subjected. None are alleged in the complaint. The language of the Court of Appeals in Gaynor v. Rockefeller, 15 N. Y. 2d 120, 129 is germane - "* * * a class action may not be maintained where the wrongs asserted are individual to the different persons involved and each of the persons aggrieved "may determine for himself the remedy which he will seek" and may be subject to "a defense not available against others."

Plaintiff's contention that the gravamen and genesis of the action lies in Sections 82 and 83 of the Local Finance Law is untenable. In the view of this court, it is straining the intendment of these statutes to predicate a cause of action on the allegation that defendants obligations were authorized for a purpose or object for which defendants were not authorized to expend money; and that such obligations were authorized in violation of the Constitutions of the State of New York and of the United States.

Defendants motion for judgment dismissing the complaint is granted. Settle order on five days notice at Chambers, Cold Spring, N. Y.

Dated: July 1, 1966

HON. JAMES W. BAILEY, JUSTICE

JAMES W. BAILEY
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

---x

CHRISTINE BROWN FINDLEY, on behalf of herself and all other Negro property owners in the Village of Nyack, Rockland County, New York, similarly situated,

Plaintiffs,

-against-

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, ROCCO LOCIODICE, HEZEKIAH H. EASTER, and JOSEPH GUERRIERI, Trustees of said Village,

Defendants.

---x

NOTICE OF MOTION TO DISMISS UNDER CPLR, RULE 3211

Index No.

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, and upon the annexed affidavits of NATALIE S. BERNE sworn to the 13th day of May, 1966, and of SAMUEL MILLER, sworn to the 13th day of May, 1966, a motion will be made at a Special Term of this Court, to be held at the County Courthouse in New City on the 31st day of May, 1966, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for judgment dismissing the complaint, pursuant to Rule 3211 of the Civil Practice Law and Rules, upon the following grounds:

1. The plaintiff has failed to furnish a bond to the defendants herein, as is required by Section 51 of the General Municipal Law, and has failed to cause such bond to be filed in the Office of the County Clerk of the County of

Rockland and to serve a copy thereof, together with the summons in this action, as is required by the said section of the General Municipal Law, and by reason thereof the plaintiff lacks legal capacity to sue.

2. The plaintiff lacks standing as a personally aggrieved party to bring this representative action, and therefore, lacks legal capacity to sue.

3. The complaint fails to state a cause of action.

And for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE NOTICE that answering affidavits, if any, are to be served upon the undersigned at least 5 days before the return date of this motion.

DATED: MAY 13, 1966

GERALD R. KANE
Attorney for Defendants, etc.
SAMUEL MILLER, of Counsel
Office Address
90 New Main Street
Haverstraw, New York 10927
429-5371

7

TO:
KOPALD, HAFT and MANDEL, Esqs.
Attorneys for Plaintiff, etc.
176 Main Street
Highland Falls, New York 10928

8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---x

CHRISTINE BROWN FINDLEY, on behalf of herself and all other Negro property owners in the Village of Nyack, Rockland County, New York, similarly situated,

Plaintiffs,

9

-against-

AFFIDAVIT
Index No.

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor and ALEXANDER CAGLIONE, ROCCO LODIODICE, HEZEKIAH H. EASTER, and JOSEPH GUERRIERI, Trustees of said Village,

Defendants.
---x

STATE OF NEW YORK)
: SS.:
COUNTY OF ROCKLAND)

NATALIE S. BERNE, being duly sworn, deposes and says:

On April 4, 1966, I was Village Clerk of the Village of Nyack.

On the aforesaid date, I was served with a Summons and Complaint in the above entitled action. There was no copy of a bond accompanying the Summons which was served upon me.

Sworn to before me this
13th day of May, 1966.

Gerald R Kane
GERALD R KANE
NOTARY PUBLIC State of New York
RESIDING IN Rockland County
My commission Expires 3/30/68

/s/ Natalie S Berne
NATALIE S. BERNE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

---x

CHRISTINE BROWN FINDLEY, on behalf of
herself and all other Negro property
owners in the Village of Nyack, Rockland
County, New York, similarly situated,

Plaintiffs,

-against-

AFFIDAVIT
Index No.

THE VILLAGE OF NYACK, NEW YORK,
WARREN D. KNAPP, as Mayor and
ALEXANDER CAGLIONE, ROCCO LODIODICE,
HEZEKIAH H. EASTER, and JOSEPH
GUERRIERI, Trustees of said Village,

Defendants.

---x

STATE OF NEW YORK)
: SS.:
COUNTY OF ROCKLAND)

SAMUEL MILLER, being duly sworn, deposes and says:

1. I am an attorney-at-law, duly admitted to practice in the Courts of the State of New York, and have my office in the Village of Haverstraw, Rockland County, New York. I am of counsel for GERALD R. KANE, Esq., who is the Village Attorney of Nyack, New York, and who is the attorney for the defendants in the above entitled action and I am fully familiar with all the facts and circumstances heretofore had herein.

2. The above entitled action was brought for a judgment annulling and setting aside a bond and capital note resolution and special election of the Village of Nyack held on March 15, 1966, and for an injunction against the issuance by the Village of the capital notes and serial bonds pursuant to the said bond and capital note resolution and from offering, selling, distributing or in any way disposing of said bonds and capital notes or receiving money or anything of value therefrom.

3. The above entitled action was commenced by the service of a summons and complaint, copies of which are hereto annexed, upon the defendants on or about April 4, 1966.

4. The time for the defendants' service of an answer in the above entitled action has been extended by stipulation to May 13, 1966, and the defendants have not served an answer to the complaint.

5. This action has been brought by the plaintiff herein who claims in paragraph "1" of the complaint that she is a resident of, qualified elector of, and an owner of real property in the Village of Nyack, which property is assessed in said village in a sum in excess of $1,000.00. These are qualifications made necessary under Section 51 of the General Municipal Law in order to permit an action under that section against persons acting for and on behalf of a village.

6. The relief asked for in the complaint appears to be aimed at preventing an alleged illegal official act on the part of such officers, and would appear to be maintainable under Section 51 of the said General Municipal Law. However, the said section also provides that the person bringing such action shall furnish a bond to the defendant, to be approved by a Justice of the Supreme Court or the County Judge of the County in which the action is brought, in such penalty as the Justice or Judge approving the same shall direct, but not less than $250.00. It also requires that such bond shall be filed in the Office of the County Clerk of the

County in which the action is brought, and that a copy shall be served with the summons in such action.

7. As appears by the affidavit of NATALIE S. BERNE, submitted herewith no copy of such bond was served with the summons in this action.

8. I personally inquired at the Office of the County Clerk of Rockland County and ascertained that the bond was not filed in such office.

9. The plaintiff also alleges that she is a member of a class, to wit, a negro property owner in the Village of Nyack, New York. It, therefore, appears that she is suing in a representative capacity. It has been held by the courts of this State, and the deponent will submit a memorandum of law to support this statement, that a representative action cannot be brought where the wrongs asserted are individual to the different persons involved and that separate wrongs to separate persons, though committed by similar means and even pursuant to a single plan do not alone create a common or general interest in those who are wronged. Furthermore, the claim of discrimination here is that members of the negro race cannot become members of the Fire Department in the Village of Nyack, and certainly, this plaintiff has not charged that she has been excluded from such membership.

10. As stated above, this is an action in the nature of a taxpayer's suit and could only be brought under the

the authority of Section 51 of the General Municipal Law. It has been held by our courts that redress may be had in such a taxpayer's action only when the acts complained of are fraudulent, or a waste of public property. The complaint here does not claim any fraud nor waste and is therefore legally insufficient.

Samuel Miller

Sworn to before me this
13th day of May, 1966.

Lillian Last Miller

LILLIAN LAST MILLER
Notary Public, State of New York
Residing in Rockland County
Commission Expires March 30, 1967

NOTE OF ISSUE

NEW YORK SUPREME COURT
Appellate Division: Second Department
---X

CHRISTINE BROWN FINDLEY, on behalf of herself
and all other Negro property owners in the
Village of Nyack, Rockland County, New York,
similarly situated,
Plaintiff-Appellant,

-against-

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP,
as Mayor, and **ALEXANDER CAGLIONE, ROCCO LOGIODICE,**
HEZEKIAH H. EASTER and **JOSEPH GUERRIERI**, Trustees
of said Village,
Defendants-Appellees

---X

1. This appeal is taken from a judgment for the defendants, entered by the Supreme Court, Rockland County, on July 28, 1966. The judgment followed a court order of July 25, 1966, granting the defendants' motion to dismiss the complaint under CPLR Rule 3211.

2. Attorneys for Plaintiff-Appellants:

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3. Attorneys for Defendants-Appellees:

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90 New Main Street
Haverstraw, New York
Telephone: 914-429-5371

4. Notice for argument for the January term, beginning January 4, 1967.

5. Note of issue filed by attorney for the plaintiff-appellant.

Respectfully submitted,

CARL RACHLIN, Esq.
Office & P.O.Address
150 Nassau Street
New York, New York 10038

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

CHRISTINE BROWN FINDLEY, on behalf of herself and all other Negro property owners in the Village of Nyack, Rockland County, New York, similarly situated,

Plaintiffs,

-against-

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, ROCCO LOGIODICE, HEZEKIAH H. EASTER, and JOSEPH GUERRIERI, Trustees of said Village,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW

STATEMENT OF FACTS

Plaintiff, a real property owner in the Village of Nyack, has commenced this action against the defendant Village on behalf of herself and all other Negro real property owners in the Village of Nyack, to annul and set aside a bond and capital note resolution of the defendant Village authorized for the purpose of purchasing certain fire fighting equipment for the Village of Nyack Fire Department through or by one of its constituent volunteer companies. Plaintiff alleges that about thirty per cent of the population of the Village of Nyack are members of the

Negro race, but that there are no Negro members of the Village of Nyack Fire Department and the Fire Department deliberately and willfully maintains systems or procedures which effectively prohibit the admission of Negros as members. This system of willful discrimination deprives the Negro residents of the Village of Nyack of their rights comparable to white residents of the Village, particularly in becoming members of the Fire Department and its constituent companies, and is solely based upon the Negro's color or race. Such conduct is in violation, among other things, of the Constitution of the State of New York and the Constitution of the United States of America.

In addition to plaintiff's plea for an annulment of the capital note and bond resolution and a permanent injunction, the plaintiff further prays that the Village be enjoined from issuing such capital notes and bonds until such time as the Village has submitted a plan acceptable to this Court and the plaintiff for the desegregation of the defendant's Fire Department and an end to the unlawful discriminatory practices. This prayer for relief on the part of the plaintiff is emphasized because of the ~~privating~~ pervading commentary underlying the defendant's papers in support of it's motion that it is this plaintiff who was halting the purchase of the fire fighting equipment and thus impairing the effectiveness of the fire fighting operation in the

Village. The fire fighting equipment is not being purchased because of the unlawful practices and procedures of the defendant's Fire Department. When or if this defendant chooses to remedy the unlawful practices, then this plaintiff will be more than content to permit this capital note and bond resolution to be sold and used for the purposes intended.

THE MOTION AT BAR

Defendant has moved, pursuant to Rule 3211 of the Civil Practice Law and Rules to dismiss the plaintiff's complaint. The gist of the defendant's attack against the complaint can be briefly summarized as follows:

a. Defendant contends that the plaintiff's complaint does not fully comply with the provisions of Section 51 of the General Municipal Law.

b. Defendant contends that this is not a proper class action, and the plaintiff cannot sue in a representative capacity.

c. Defendant finally contends that Section 82 of the Local Finance Law does not afford to this plaintiff the relief she seeks.

Inasmuch as this is a motion under Rule 3211, the allegations of the plaintiff's complaint must be deemed to be true.

ARGUMENT

I. Section 51 of the General Municipal Law does not apply to the case at bar, but if it does, it has been complied with, with the exception of the posting of the bond which may be done"nunc pro tunc."

II. This is a proper class action under Section 1005 of the Civil Practice Law and Rules.

III. This action is properly brought under Section 82 of the Local Finance Law in that defendant's obligations were authorized for an object or purpose for which the defendant is not authorized to expend money and such obligations were authorized in violation of the Constitution of the State of New York and the Constitution of the United States of America.

I. Section 51 of the General Municipal Law does not apply to the case at bar, but if it does, it has been complied with, with the exception of the posting of the bond which may be done "nunc pro tunc."

Plaintiff's complaint is based upon Section 82 of the Local Finance Law of the State of New York, and specifically upon Sections 1 and 3. Plaintiff alleges in paragraph 13, sub-divisions D and E of her complaint that the obligations of the defendant were authorized for an object or purpose for which it was not authorized to expend money and were authorized in violation of the provisions of the Constitution. An examination of Section 82 of the Local Finance Law does not indicate that an action brought under this provision must follow the procedural requirements of Section 51 of the General Municipal Law. Even if this is so, however, it is submitted that plaintiff's complaint in all respects but one complies with the procedural requirements of Section 51 - the summons and complaint were served within the 20 day period and plaintiff is a real property owner within the defendant Village and her property has an assessment of more than $1,000.00. The plaintiff did not, however, file the bond for $250.00 as set forth in Section 51. If this Court believes that Section 51 does apply to the procedural aspects of the commencement of plaintiff's lawsuit, then plaintiff will immediately file such bond. There is, of course, ample authority for the filing of such bond nunc pro tunc. See Eith v. City of New York, 165 Misc. 18 (1938), Shaw v. Topping, 142 N.Y.S. 2d 490 (1955).

II. This is a proper class action under Section 1005 of the Civil Practice Law and Rules.

Defendant contends that this is not a proper "class action" under Section 1005 of the Civil Practice Law and Rules, relying entirely upon the opinion in Gaynor v. Rockefeller, 15 N.Y. 2d 120 (1965). The Gaynor case is clearly distinguishable from the case at bar.

The Gaynor case was brought by the plaintiffs and "all other Negro citizens of New York similarly situated" against the State and City of New York challenging the expenditure of public funds by the State and City on public work projects upon the grounds that qualified Negroes were denied employment on these jobs because the contractors hired by the City drew their labor from unions in which discrimination was practiced. The Court of Appeals indicates that Gaynor could not be considered a "class action" primarily because of the different forms which the grievances of each member of the class could take in the Gaynor situation and because other, and in the Court's opinion, adequate remedies were available to at least some of the class which Gaynor proported to represent. Herein lies the fundamental difference between the Gaynor and the case at bar.

This plaintiff does not sue on behalf of a large, ill-defined or perhaps undefinable class of people as in Gaynor. Mrs. Findley sues on behalf of a very particular definable class, to wit: Negro property owners within the Village of Nyack. Surely, it must be conceded that this class has a clear common interest in the issues at bar. Furthermore, there are no other remedies available to any member of the class for which Mrs. Findley sues other than the remedy pursued herein. In Gaynor, it appeared to the Court of Appeals that various statutes of the State may have been violated by the labor unions involved. The remedies available to the Gaynor "class" are provided for by the New York State Legislature by the creation of the State Commission for Human Rights and the presentation of grievances to the Commission based upon the facts of each individual case. No such legislative remedy is available to the plaintiff herein, or to the class which she represents.

Finally, the Gaynor decision is hinged upon the "remoteness" of the government officials named as defendants in the Gaynor complaint and the unions in which the discrimination was practiced. The Court of Appeals questioned the ability of the municipal authorities named as defendants to even give the relief sought by Gaynor in view of the fact that the only remedy available to the municipal authorities was to invoke penalties under its construction contracts. No such remoteness exists in the case at bar. The Fire Department of the Village of Nyack is the Fire Department of the Village. The defendant Board of Trustees acts as the Board of Fire Commissioners of the Village. All funds obtained by the Fire Department and its various companies are obtained by and from the defendant Village. The capital note and bond resolution, which is the specific subject of this lawsuit, demonstrates itself the direct control and responsibility which this defendant Village has over its Fire Department and its constituent companies.

The common interest of the members of the class in the case at bar is undeniable. Each Negro property owner in the defendant village by virtue of his ownership will be assessed a proportionate share of the cost of the capital note and bond if the same is permitted to stand. It is not material that the amounts to which each member of the class is entitled is different. The rule is stated this way in Weinstein, Korn and Miller, New York Civil Practice, Volume 2, Section 1005-12,

> "The fact that each member of the class might be entitled to different sums is, in itself, no basis for denying the class action."

In Morschauser v. American News Company, 6 App. Div. 2d, 1028 (1958), the Appellate Division upheld the representative character of an action brought on behalf of over 1300 former employees who sued for severance and vacation pay. The amount of pay for each individual varied according to the length of his service and rate of pay but the Court ruled that the question of common interest should be decisive in determining whether the "class" action should be allowed.

The wide variety of actions in which representative or "class" suits have been permitted demonstrates the availability of this remedy to the plaintiff at bar. In the following lawsuits "class" actions were permitted. Kovarsky v. Brooklyn Union Gas Co. 279 N. Y. 304 (An action brought by a consumer to restrain the gas company from making a special service charge.); Rhine v. New York Life Insurance Co., 273 N. Y. 1, (Policy holder of an insurance company for a claimed overcharge on premiums for disability benefits); Borg v. New York Majestic Corp. 139 N. Y. S. 2d, 72 (Action by bond holder against a corporation and trust company to avoid an alleged agreement between the corporation and the trust company to extend the maturity date of certain bonds.); Jones v. Healy, 56 N. Y. S. 2d, 349, (Action by dissenting stockholders to set aside an appraisal of stock of shareholders).

III. This action is properly brought under Section 82 of the Local Finance Law in that defendant's obligations were authorized for an object or purpose for which the defendant is not authorized to expend money and such obligations wereauthorized in violation of the Constitution of the State of New York and the Constitution of the United States of America.

At one point in its affidavits submitted in support of its motion, defendant contends firstly, that this plaintiff is not or will not be aggieved by the issuance of the capital note and bond and, secondly, that a taxpayer's action must be based upon "fraud or waste". The first of these contentions represents defendant's repeated refusal to deny the gist of plaintiff's complaint. The second of these contentions is not supported by the laws of the State of New York.

Plaintiff's grievance is that as a real property owner she will be compelled to pay her proportionate share of the cost of the bond and capital note although, as she contends, the bond and capital note were authorized and approved for a purpose for which the defendant is not authorized to expend money and for a purpose which is unconstitutional.

Secondly, the notion that a taxpayer's action may be only brought for "fraud or waste" is not justified by an examination of the laws of the state. The law is well settled that a taxpayer's action may be based upon the illegal incurrence of a debt by a municipal body. Ayers v. Lawrence, 59 N. Y. 192; Kenwell v. Lee, 261 N. Y. 113; Kathan v. Jones 201 App. Div. 580; and Metzger v. Attica and Arcade Railroad Company 79 N. Y. 171.

This action is based upon subdivisions 1 and 3 of Section 82 of the Local Finance Law which reads that the validity of obligations authorized may be contested only if

> (1) Such obligations were authorized for an object or purpose for which the municipality, school district or district corporation is not authorized to expend money, or
>
> (2) . . . . . .
>
> (3) Such obligations were authorized in violation of the provisions of the Constitution.

Defendant contends that subdivision 3 relates only to the portions of the Constitution involving restrictions on local indebtedness. The only citation given by the defendant in support of this astounding proposition which flies in the face of the clear language of the statute is the cross-reference of an editor of the Edward Thompson Company in the McKinney's Consolidated Laws of New York, Volume No. 33. The plain language of subdivision 3 makes no such limitations upon the statute. If such limitation were intended, the Legislature, in amending this section in 1944, had ample opportunity to do so.

Nor is it of any consequence in determining the application at bar that the defendant village may or may not have followed the proper procedure in the authorization of the bond or capital note. Justice Holmes stated the rule in this way in Western Union Telegraph Co. v. Foster, 247 U. S. 105, 247 L. Ed. 1006,

> ". . . . acts generally lawful may become unlawful when done to accomplish an illegal end and a Constitutional power cannot be used by way of condition to attain an unconstitutional result."

See also, Aikens v. Wisconsin, 185 U. S. 194 and United States v. Reading Co. 226 U. S. 324.

In addition, there is ample demonstration of Courts preventing the performance of an otherwise valid discretionary act because the government agencies performing the act have sought to further a pattern of discrimination. Tate v. State

Department of Conservation and Development, 133 F. Supp. 53, aff'd. 231 F. 2d, 615, cert. denied 352 U. S. 834 (invalidating the sale of public lands to continue discrimination;) Lawrence v. Hancock 75 F. Supp. 1004 (prohibited leasing of swimming pool because it was a technique for avoiding desegregation); Simkins v. City of Greensboro, 149 F. Supp. 562, aff'd. 246 F. 2d 425 (prohibited leasing of public golf course if used to avoid integration).

Although not raised in defendant's affidavits in supportof this motion, defendant, in its memorandum of law suggests that the defendant's actions are not unconstitutional and particularly under the meaning of subdivision 3 of Section 82 of the Local Finance Law. It is respectfully submitted that this issue is not properly before the Court having not been raised in the moving papers. Notwithstanding this, it is conceded that the issue is at the heart of this matter and it is therefore incumbent upon the plaintiff to set forth with some particularity the Constitutional and statutory provisions relief upon in this action.

Firstly, it is quite clear that the conduct of the defendant, not only in authorizing the capital note and bonds which is the subject of this lawsuit, but in generally maintaining a public agency which follows discriminatory practices, is in clear violation of Article I, Sec. 11 of the Constitution of the State of New York, reading as follows:

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution or by the state or by any agency or subdivision of the state."

Section 1 of the XIV Amendment of the Constitution of the United States is also clearly involved:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Congress has elaborated upon the "equal protections" clause of the XIV Amendment in 42 U. S. C. A. Sections 1981 et seq., 42 U. S. C. A. Section 1983 is of particular interest:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is therefore submitted that the clear mandate of the New York and United States Constitution and the acts of Congress render unconstitutional the course of conduct of the Village of Nyack Fire Department in pursuing a systematic procedure of discrimination against Negroes for membership. This public agency, the Fire Department of the Village of Nyack, supported wholly by public funds whose members are the beneficiaries of certain privileges and immunities granted to them by the state and the local municipality, by its actions has denied to otherwise qualified residents of the Village of Nyack such privileges and immunities purely because these public supported agencies do not like the color of the applicant's skin or his race.

It is contended by the defendant that because the "procedure" used by it in passing the bond and capital note resolution appears to have been in proper form, the plaintiff can raise no other constitutional issue. Such contention is of no weight in view of the decision of Justice Holmes in Western Union Telegraph Co. v. Foster, supra, and the other cases cited herein.

It is further contended by the defendant that the plaintiff has suffered no "individual wrong" herein. This bald statement belies the facts of the complaint deemed to be true on this motion. If the discriminatory practices of the Village's Fire Department violate the Constitution of the State and of the United States, then the plaintiff cannot and should not be forced to pay her proportional cost of the bond and thus foster and promote and unconstitutional and illegal procedure. The plaintiff's individual grievance herein is the requirement that would be placed upon her to support the practices complained of. Finally, we must deal with a suggestion not strictly before this Court in the context of this motion but apparently pervading the thinking of the defendant. Defendant suggests that its Fire Department and its constitutent fire companies are independent of the defendant itself and the defendant has no power to alter the wrongs complained of. The suggestion is further made that the only function of the defendant village is that prescribed by the statutes of the State of New York in providing funds forthe fire department of the village. This suggestion is factually incorrect and not borne out by the law of this land. The connection and control of the defendant over its fire department and its constituent companies is perfectly clear. The defendant obtains and delivers to the Fire Department all of the funds it uses for its stated purpose of fire fighting. It is understood that the Board of Trustees of the defendant village constitute the Board of Fire Commissioners of the Nyack Fire Department and the role of the State of New York, in supporting this fire department, is equally clear. The State provides a system of pension benefits; the State authorizes partial exemptions from real property taxes. It is therefore respectfully submitted that the conduct of the Fire Department of the Village of Nyack is in violation of Article I, Section 11 of the New

York State Constitution and particularly in violation of Section 1 of the XIV Amendment of the Constitution of the United States of America. The operation of the Fire Department of the Village of Nyack is a "state" operation and as such any conduct or procedure which furthers the purpose of this "state" agency, must fail in violation of the Constitution because of the discriminatory practices deemed admitted in this application.

The extent to which the United States Supreme Court has found activities to be "state" activities and thus in violation of Section 1 of the XIV Amendment is illustrated by Burton v. Wilmington Park Authority, 365 U. S. 715. In Burton, the Parking Authority was an agency created by the State of Delaware. The Parking Authority in turn leased a portion of its property to Eagle Coffee Shoppe, Inc., a private company, to operate a restaurant and a parking lot. Burton, a Negro, was refused service in Eagle's restaurant solely because he was a Negro. The Supreme Court held that this was "state" action in violation of the XIV Amendment because of the state's substantial contacts with the Parking Authority and even though a Delaware statute did not compel non-discrimination in public restaurants.

Another case decided by the United States Supreme Court is pertinent to the issue at bar. In Shelley v. Kraemer, 334 U. S. 1 (1947), it was held that the judicial enforcement by a state court of privately imposed covenants restricting the use of real property to white persons only violated the equal protection clause of the XIV Amendment. In so holding, the Supreme Court agrees that the XIV Amendment is directed to "state" action only, but that the action of the state court in upholding the restrictive covenants against Negroes was "state action" in violation of the XIV Amendment.

If the plaintiff herein is denied the right to contest the operation and promotion of an unconstitutional "state activity" as the Nyack Fire Department must be deemed to be, and if this plaintiff is denied the right to redress for her personal grievance in being forced to pay a proportionate share of the cost of an indebtedness contracted to promote the activities of this discriminatory state agency, then in such event it is respectfully submitted that the action of this Court in denying plaintiff the right to bring this action and obtain redress in our courts against this improper conduct will, of itself, be a denial of equal protection under the XIV Amendment of the Constitution of the United States of America.

CONCLUSION.

Defendant's motion to dismiss the complaint under Rule 3211 should be denied together with the costs and disbursements of this action and together with such other and further relief as to the Court may seem just and proper.

KOPALD, HAFT & MANDEL
Attorneys for Plaintiff

CARL RACHLIN, of Counsel

MYRON I. MANDEL, Counsel

To be argued by
SAMUEL MILLER
Time for argument: 20 minutes
(Rockland County Clerk's Index No. 1518—1966)

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

◆

CHRISTINE BROWN FINDLEY, on behalf of herself and all other Negro property owners in the Village of Nyack, Rockland County, New York, similarly situated,

Plaintiff-Appellant,

—against—

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, ROCCO LOGIODICE, HEZEKIAH H. EASTER and JOSEPH GUERRIERI, Trustees of said Village,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS

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Attorneys for Defendants-Respondents.

TABLE OF CONTENTS

PAGE

Statement 1

Questions Involved 3

Argument

Point I—Appellant lacks standing as a personally aggrieved party to bring this action 3

Point II—The complaint fails to allege facts sufficient to state a cause of action under Section 51 of the General Municipal Law 5

Point III—Sections 82 and 83 of the Local Finance Law does not give authority to contest the issuance of municipal obligations on the ground that the proceeds thereof will be used to purchase fire equipment for a department which is charged with practicing discrimination on account of race or color 6

Conclusion 11

To be argued by
SAMUEL MILLER

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

CHRISTINE BROWN FINDLEY, on behalf of herself and all other Negro property owners in the Village of Nyack, Rockland County, New York, similarly situated,

Plaintiff-Appellant,

—against—

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, ROCCO LOGIODICE, HEZEKIAH H. EASTER and JOSEPH GUERRIERI, Trustees of said Village,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS

Statement

This action was commenced in the Supreme Court, Rockland County by the service of a summons and complaint.

The plaintiff alleges as follows: That she is a resident taxpayer of the defendant Village of Nyack and owns real property therein assessed on the assessment roll of the Village in a sum in excess of $1,000.00; that she is a member of a class, to wit, Negro property owners in the Village of Nyack; that the Village, adopted a bond and capital note resolution authorizing the issuance and sale of bonds and capital notes for the purpose of purchasing an emergency rescue fire truck for the use of its Fire Department; that the resolution was subject to a permissive referendum and, on its own motion, the Village Board of Trustees submitted the proposition for approval at a referendum election held on March 15, 1966; that there are no Negro members in any of the constituent companies of the Village Fire Department, and that the said Department and its constituent companies have adopted and wilfully and deliberately maintain systems and procedures whereby Negroes, otherwise qualified, are prevented and prohibited from becoming members thereof, solely by reason of their color or race; that about 30% of the Village population are members of the Negro race and among them are Negroes who have attempted to and could become members thereof, except for the said discriminatory practices; that by reason thereof the Negro residents of the Village have been and are being deprived of the same rights accorded to white residents thereof, in violation of the Federal and State constitution and statutes; and that the resolution authorizing the bonds and capital notes and the approval thereof at the special election are invalid, illegal, unconstitutional and void and the proposed bonds will be so by reason of the alleged discriminatory practices.

The plaintiff seeks a judgment annulling and setting aside the aforesaid resolution and special election, and asks for an injunction against the issuance of notes and bonds pursuant thereto unless and until a plan for desegregating the Fire Department has been filed with and approved by the Court, and carried out to the Court's satisfaction.

The defendants moved to dismiss the complaint under CPLR Rule 3211, and the motion was granted. This appeal is taken from the order, dated July 25, 1966, dismissing the complaint and from the judgment thereon entered on July 29, 1966.

Questions Involved

The following questions were all necessarily at Special Term in connection with the motion of the respondents to dismiss the complaint:

1. Does the plaintiff-appellant have standing to bring a class action for injunctive and declaratory relief directed against racial discrimination in admitting applicants to membership in the Village of Nyack Fire Department, where the complaint fails to allege that plaintiff ever applied for admission, or that she herself was otherwise qualified?

2. Is the complaint defective for failing to allege facts sufficient to state a cause of action under Section 51 of the General Municipal Law?

3. May the issuance of municipal obligations be contested under Sections 82 and 83 of the Local Finance Law on the alleged ground that such bonds will enable the purchase of fire equipment to be used by a Fire Department which discriminates in its practices of admission to membership therein?

ARGUMENT

POINT I

Appellant lacks standing as a personally aggrieved party to bring this action.

It is fundamental that the courts can only adjudicate real controversies between litigants and will not issue advisory opinions or decide abstract, hypothetical or contingent questions. *Matter of State Industrial Comm.,* 224 N.Y. 13, 16; *Wardrop Co., Inc.* v. *Fairfield Gardens, Inc.,* 237 App. Div. 605.

Actions for declaratory judgment or injunctive relief are no exception to this general rule. The plaintiffs in such actions must show, as a basis for standing, a direct infringement of their personal rights or interests. *Gaynor* v. *Rockefeller,* 15 N.Y. 2d 120; *St. Clair* v. *Yonkers Raceway, Inc.,* 13 N.Y. 2d, 72; *Brenner* v. *Title Guarantee and Trust Co.,* 276 N.Y. 230, 238; *Schieffelin* v. *Komfort,* 212 N.Y. 520, 530; *Bull* v. *Stickman,* 273 App. Div. 311, aff. 298 N.Y. 516, rearg. den. 300 N.Y. 460; *E. B. Latham* v. *Mayflower Industries,* 278 App. Div. 90; *Pratt* v. *La Guardia,* 182 Misc. 462, 469.

In *Gaynor* v. *Rockefeller* (supra), the Court of Appeals stated at Page 130:

> "The Plaintiffs thus have standing here to complain only of grievances to which they have individually been subjected."

In the absence of any showing that appellant has been aggrieved personally by discrimination in the area referred to, she may not supply standing which she patently lacks, by purporting to bring this action as a "class action."

In *McCabe* v. *A. T. & S. F. Ry. Co.,* 235 U.S. 151, it was held that "the essence of the constitutional right is that it is a personal one." Mr. Justice Hughes stated (at page 162):

> "The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

The appellant has not alleged in her complaint that she is qualified to join the Nyack Fire Department, that she has applied for membership therein and has been refused admission thereto because of her color or race and she, therefore, has no standing to bring this action.

POINT II

The complaint fails to allege facts sufficient to state a cause of action under Section 51 of the General Municipal Law.

A taxpayer's action under Section 51 of the General Municipal Law may be maintained "when the acts complained of are fraudulent, . . . or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes". *Gaynor* v. *Rockefeller* (supra) at pages 133 and 134; *Stahl Soap Corp.* v. *City of New York,* 5 N.Y. 2d 200, 204.

It is not enough, however, to maintain an action under Section 51 of the General Municipal Law that the acts complained of may be illegal. Assuming, arguendo, that there is illegality, it must also be shown that the illegal acts are in some way injurious to municipal interests and that, if permitted to continue, they will result in a waste of public funds or will otherwise produce some public injury. *Campbell* v. *City of New York,* 244 N.Y. 317; *Rogers* v. *O'Brien,* 153 N.Y. 357; *Western New York Water Co.* v. *City of Buffalo,* 247 N.Y. 202.

The allegations of the complaint herein fail to show any waste of public funds or injury to the public interest in connection with the proposed issuance of the municipal obligations. Indeed, the relief demanded herein, if granted, would, by not providing sufficient fire protection, seriously endanger the property, the safety and even the lives of the entire community, including the plaintiff-appellant's and those whom she claims to represent.

POINT III

Sections 82 and 83 of the Local Finance Law does not give authority to contest the issuance of municipal obligations on the ground that the proceeds thereof will be used to purchase fire equipment for a department which is charged with practicing discrimination on account of race or color.

Section 82 of the Local Finance Law reads as follows:

> After the publication of a resolution or certificate together with such a notice, the validity of the obligations authorized thereby may be contested only if:
>
> 1. Such obligations were authorized for an object or purpose for which the municipality, school district or district corporation is not authorized to expend money, or
>
> 2. The provisions of law which should have been complied with at the date of the publication of such resolution or certificate were not substantially complied with, and an action, suit or proceeding contesting such validity is commenced within twenty days after such publication, or
>
> 3. Such obligations were authorized in violation of the provisions of the constitution.

Section 83 of the Local Finance Law reads as follows:

a. If an action, suit or proceeding contesting the validity of the obligations authorized by such resolution or certificate is commenced within twenty days from the date of publication of such resolution or certificate together with such notice, the court in which such action, suit or proceeding is commenced shall determine whether or not such obligations were authorized for an object or purpose for which the municipality, school district or district corporation is authorized to expend money or the provisions of law which should have been complied with were substantially complied with.

b. The court may determine that the provisions of law which should have been complied with were substantially complied with if:

1. They authorized the aggregate amount of obligations authorized by such resolution or certificate.

2. Such resolution was adopted by the required vote of the finance board or such certificate was duly made by such chief fiscal officer.

3. Such resolution or the proposition for the expenditure of money for the object or purpose for which such resolution authorizes the issuance of obligations, as the case may be, was adopted at the election or meeting, if any, to which it was submitted.

c. Such determination may be arrived at notwithstanding any irregularity or failure to observe a technicality in:

1. The form of such proposition, resolution or certificate.

2. The notice of the election or meeting to which such proposition or resolution was submitted or of the meeting at which the finance board adopted such resolution.

3. The time or manner of the service or publication of such notice.

4. The conduct of the election, meeting or meetings at which such proposition or resolution was adopted.

5. The submission of such proposition more than once within one year or other shorter period than authorized by law.

6. Like matters in such proceedings.

Nothing in the complaint alleges that the bonds were authorized for an object or purpose for which the Village is not authorized to expend money.

Nor is it alleged in the complaint that the provisions of law which should have been complied with at the date of the publication of the resolution were not substantially complied with.

The only general allegation is that there has been a violation of the constitutional rights of Negro citizens of the Village of Nyack.

In an article titled "The Scope and Basis of the Local Finance Law," appearing as a preface to McKinney's Edition of the Local Finance Law, Judge Stephen M. Lounsberry, former counsel to the Temporary State Commission for the Study, Revision and Codification of the Laws Relating to Municipal Finance, states (at pages IX and X):

> "The Local Finance Law's interest is mainly with the manner, that is to say the procedure, of local borrowings. Let a unit of government find in some other law the power to spend, to accomplish a purpose, to do the thing—untrammeled by any mandate

> that the money must be raised by taxation, or derived from some other specific source—and, armed with such authority, it may turn to the Local Finance Law for the power to borrow and for guidance in all the processes involved."

He traces the history of the legislation and constitutional provisions leading up to the Local Finance Law as we now have it and Article VIII of the New York State Constitution. He refers to the following statement of the Court of Appeals in *McCabe* v. *Gross,* 274 N.Y. 39:

> "The mischief to be prevented was the creation of an excessive debt, the carrying charges of which would fall upon current revenues and the principal upon posterity."

It is respectfully submitted that even if the charges of discrimination were true, this is not the constitutional violation to which the Local Finance Law addresses itself.

It is apparent that the framers of these statutes had in mind only the question of limitation on the amount that municipalities could borrow. They had no intention of making these sections of the law available for raising objections on the ground that other constitutional provisions may be violated by the municipality.

When Title 6 of Local Finance Law, of which Sections 82 and 83 are a part, was proposed, the Municipal Financial Commission stated that Section 80 and Sections 81 thru 83 provide a permissive procedure for the validation by resolution of obligations issued by any municipality. (See McKinney's Local Finance Law, page 123). The courts have been reluctant to extend the use of these sections for any other purpose.

In *Petition of the Board of Fire Com'rs* v. *Columbia-Litchfield Fire District,* 29 N.Y.S. 2d 605, a proceeding was brought to validate bonds of the fire district. Taxpayers of the district attempted to question the legality of the formation or the organization of the fire district. The court declared that the statutes which were available to validate municipal obligations, may not be used for the purpose of attacking the legality of the organization of the municipality. The court there stated that the appropriate, if not the only remedy, to test the legality of the municipal corporation was by a quo warranto proceeding.

Sections 82 and 83 of the Local Finance Law were never intended to be used for the purpose of attacking the organization of the fire district nor the manner in which members are elected thereto. Neither are such sections available to question the constitutionality of the actions of either the fire companies or the fire district or even of the Village, with the one exception: Whether the debt limits of the municipality are being exceeded.

We are not here challenging the aims of the plaintiff-appellant, nor of those for whom she claims to speak. We contest the method used to achieve these aims. If they were permitted to attack and to stop every and any governmental activity by the strained interpretation of statutes as is here attempted, we would soon have anarchy.

CONCLUSION

The order and judgment of the Supreme Court, Rockland County, dismissing the complaint herein should be affirmed.

Respectfully submitted,

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Pierre A. Tonachel, Esq.

NEW YORK SUPREME COURT

Appellate Division - Second Department

CHRISTINE BROWN FINDLEY, on behalf of herself and all other Negro property owners in the Village of Nyack, Rockland County, New York, similarly situated,

Plaintiff - Appellant,

-against-

THE VILLAGE OF NYACK, NEW YORK, WARREN D. KNAPP, as Mayor, and ALEXANDER CAGLIONE, ROCCO LOGIODICE, HEZEKIAH H. EASTER and JOSEPH GUERRIERI, Trustees of said Village,

Defendants - Appellees.

BRIEF AND APPENDIX FOR
PLAINTIFF - APPELLANT

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TABLE OF CONTENTS

Page

Statement Pursuant to CPLR Rule 5531 1
Statement of Questions Presented

Statement of Facts

Argument:

POINT I. The Validity of Municipal Obligations for an Unconstitutional or Illegal Purpose May Be Contested Under Sections 82 and 83 of the Local Finance Law.

POINT II. The Acts of Municipal Officers in Authorizing the Use of Funds for a Discriminatory Purpose can be Prevented Under Section 51 of the General Municipal Law.

POINT III. A Taxpayer has Standing to Bring Suit Against the Authorization of the Use of Municipal Borrowing Power and Municipal Funds for an Illegal Discriminatory Purpose.

Conclusion

Appendix A-1

- Notice of Appeal
- Judgment Appealed From
- Order Appealed From
- Opinion
- Notice of Motion to Dismiss
  - Affidavit of Natalie S. Berne
  - Affidavit of Samuel Miller
- Verified Complaint

Statement Pursuant to CPLR Rule 5531:

This action was brought in Supreme Court, Rockland County (Index No. 1518-1966), by the plaintiff-appellant, Christine Brown Findley, on behalf of herself and all other Negro property owners of the Village of Nyack, New York, to annul and set aside steps taken by the defendant-appellees in connection with a proposed issuance and sale of certain obligations of the Village. The proceeds of such obligations are intended to be used for the purposes of the Village of Nyack Fire Department, which plaintiff-appellant alleges has adopted and pursues a policy of discrimination based upon race or color, and does not permit Negroes to serve in this department. Not seeking to prevent improvement to the Fire Department, plaintiff-appellant merely seeks to enjoin the issuance and sale of such obligations until the defendants demonstrate in a reasonable manner to the Court that appropriate steps have been taken to end the discriminatory practices complained of.

Defendants and appellees are Warren D. Knapp, Mayor of the Village, and Alexander Caglione, Rocco Logiodice, Hezekiah H. Easter and Joseph Guerrieri, Trustees of the Village. The action was commenced by service of a summons and verified complaint on April 4, 1966. No answer has been served. Instead, by motion made pursuant to Notice of Motion dated May 13, 1966, defendants moved to dismiss the complaint under CPLR Rule 3211. This motion was granted by order dated

July 25, 1966 and judgment for defendants was entered on July 28, 1966.

Statement of Questions Presented:

1. May the validity of village obligations authorized for the purpose of purchasing equipment for use by a village agency which has adopted and continuously practiced racial discrimination in violation of New York and federal statutes and Constitutions be contested under Sections 82 and 83 of the Local Finance Law, which set forth standards and procedures for contesting validity of village obligations? The Court below held such contest not within the purposes of the Local Finance Law.

2. Are the official acts of village officers in authorizing village obligations providing for the disbursement of public funds to support a discriminatory village agency acts which may be prevented under Section 51 of the General Municipal Law, providing for maintenance of actions against illegal official acts? The court below held such acts may not be challenged under the General Municipal Law.

3. Does a Negro taxpayer have standing to bring an action to prevent village officers from taking acts which serve to further the activity of a village agency which discriminates against Negroes in violation of New York and federal statutes and Constitutions? The court below held that plaintiff-appellant does not have such standing.

Statement of Facts:

The complaint alleges (A-22), and it is deemed admitted for the purposes of this appeal, that the Village of Nyack Fire Department has adopted and maintains procedures which prevent and have prevented Negroes from becoming members of such Fire Department solely because of their color or race. The plaintiff-appellant is a Negro property owner of the Village of Nyack. As more fully set forth in the complaint (A-18) and in the opinion of the court below (A-5), the defendants are officials of such Village who by various acts effected authorization of the issuances of obligations of the Village for the purpose of purchasing certain equipment for the Village Fire Department.

Seeking to prevent the issuance and sale of Village obligations and the use of Village funds for repayment of such obligations on the ground that such obligations and such use of funds would be for an illegal and unconstitutional purpose, the plaintiff-appellant charged specifically (A-22) that as the proposed use of such funds was in furtherance of the purposes of a discriminatory public agency, such obligations were in violation of the Constitutions and statutes of New York and the United States.

Without having answered the complaint, defendant-appellees moved to dismiss on the ground that the complaint failed to state facts sufficient to constitute a cause of action. Such motion was granted and plaintiff-appellant brings this appeal from the judgment thereupon entered.

ARGUMENT:

POINT I: The validity of municipal obligations for an unconstitutional or illegal purpose may be contested under Sections 82 and 83 of the Local Finance Law.

Section 82 of the Local Finance Law specifically permits contesting the validity of municipal obligations if:

> "1. Such obligations were authorized for an object or purpose for which the municipality *** is not authorized to spend money, or
>
> *****
>
> "3. Such obligations were authorized in violation of the provisions of the constitution."

Section 83 deals with the procedural limitations upon actions or proceedings to contest the validity of municipal obligations, and requires that

> "***The court in which such action, suit or proceeding is commenced shall determine whether or not such obligations were authorized for an object or purpose for which the municipality *** is authorized to expend money.***"

Accordingly, if the proposed purposes for which the proceeds of village obligations are to be used are either unconstitutional or not an authorized municipal purpose, the validity of such obligations may be contested.

Discrimination of the type described in the complaint is unquestionably a violation of the constitution (Article 1, Section 11) and statutes (Civil Rights Law, Section 40; Executive Law, Section 296(2); Penal Law, Section 514) of this state, as well as of the constitution (14th Amendment) and statutes (Title 42 U.S.Code SS. 1981 et seq., specifically S. 1983) of the United States. Where public funds are used in a manner which provides facilities used in a discriminatory manner, such use is illegal even where the public officials involved are not directly engaged in discrimination. *Burton* v. *Wilmington Pkg. Auth*., 365 U.S. 715, 81 S. Ct. 856, 98 L. Ed. 361; *Simkins* v. *Moses H. Cone Memorial Hospital*, F. 2nd 959, cert. den. 376 U.S. 938 (1964).

Defendant-appellees in this case were acting as a board of fire commissioners (Village Law S. 202-a(12) in authorizing the obligations in question. As such, they are joint participants with the Village Fire Department and constituent companies in the commission of the discriminatory acts complained of. Thus this case is immediately distinguishable from *Gaynor* v. *Rockefeller*, 15 N.Y. 2nd 120, 256 N.Y.S. 2nd 584, 204 N.E. 2nd 627, cited by the court below. In the Gaynor case the illegal discrimination was being practiced by private union officials, which the Court of Appeals recognized were not "organs of the State" or "repositories of official power", and the use put to the completed building would not be discriminatory.

Thus, the instant case presents alleged acts of discrimination forming an element of the operation of a public agency--the Village Fire Department. The illegality and unconstitutionality of such discriminatory operations are evident. Equally evident is the power and duty of the courts under Sections 82 and 83 of the Local Finance Law to prohibit the use of municipal borrowing power to further such illegal and unconstitutional operations. An expenditure in such form is beyond the powers of the Village.

POINT II: The acts of municipal officers in authorizing the use of funds for a discriminatory purpose can be prevented under Section 51 of the General Municipal Law.

Section 51 of the General Municipal Law provides for the prosecution of municipal officers and maintenance of actions against them

> "*** to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons***."

As fully discussed under Point I, the expenditure of public funds in furtherance of discriminatory activities violates both the statutes and constitutions of the State and federal governments.

Section 51 of the General Municipal Law can be seen as complementary to the procedures provided in Sections 82 and 83 of the Local Finance Law. Where the Local Finance Law provides a means to challenge the validity of illegally authorized municipal obligations, the General Municipal Law provision provides for a proceeding directed at the municipal officers involved. The appropriateness of this remedy to the offenses set forth in the verified complaint might not be questioned were it not for certain statements appearing in the opinion in Gaynor v. Rockefeller (supra), in which the applicability of Section 51 was considered directly. Cf. also 21 A.D. 2nd 92, 248 N.Y.S. 2nd 792.

The courts in the Gaynor case found that on the facts presented, there was not the requisite showing of injurious use of public funds. An important distinction, however, exists between the facts of the instant case and those in Gaynor. The discrimination in Gaynor, forming the basis for the charge of illegality in the use of public funds, was discrimination by labor organizations whose members were employed by contractors engaged by the state and municipality to construct certain public buildings. Not charged in Gaynor, as it is in fact charged here, was the argument that the public buildings when built would be used for an illegal and unconstitutional discriminatory purpose. Were, in Gaynor, the buildings to be used for a discriminatory purpose, we submit that the Gaynor decision would have been different.

Given the facts that the proceeds of the proposed municipal borrowing are to be expended by and on behalf of a discriminatory public agency, there can be little argument that the acts of municipal officers in authorizing such borrowing are contributing to and participating in the illegal and unconstitutional discrimination being furthered by such borrowing. It has clearly been recognized that public funds may not be wasted in the support of segregated school or hospital facilities, 42 U.S.C.A., S. 1983 and 42 U.S.C.A., S. 1985: Article 8, Section 1, N.Y. Const. No reason is apparent for granting an exception to this recognized public policy in the financing or operation of the Village Fire Department. Since the expenditure of such money for a discriminatory unconstitutional purpose could not be countenanced, it would appear equally inappropriate to borrow money and pledge the village credit where the proceeds of such borrowing are to be used for such unconstitutional purpose.

POINT III. A taxpayer has Standing to Bring Suit Against the Authorization of the Use of Municipal Borrowing Power and Municipal Funds for an Illegal Discriminatory Purpose.

The court below is of the opinion that plaintiff-appellant would not have standing to bring an action as representative of the class of persons injured by the wrongs set forth in the complaint.

The issue of standing appears to have been raised in relation to the applicability of the General Municipal Law.

The verified complaint sets forth the necessary jurisdictional facts to support plaintiff-appellant's standing to bring suit under Section 51 of the General Municipal Law. This section authorizes what are popularly called "taxpayer's actions", and provides that such actions may be brought

> "***by any number of persons or corporations, jointly, the sum of whose assessments shall amount to one thousand dollars, and who shall be liable to pay taxes on such assessment in the *** village. ***"

Plaintiff-appellant has demonstrated compliance with such jurisdictional standards in her complaint.

The opinion below sets forth the language of the Court of Appeals in Gaynor v. Rockefeller in support of the view that plaintiff-appellant lacks standing to sue.

It should be noted, however, that the language quoted is taken from that part of the Court of Appeals opinion which held that Gaynor and the other individual plaintiffs could not maintain, on a representative basis, an action for numerous violations by the defendant unions of various provisions of the Civil Rights Law, Executive Law, Labor Law and New York City Administrative Code. The Court of Appeals itself commented upon the various actions brought in Gaynor at 15 N.Y. 2nd, 127, where it states

> "*** Joined with the class action is a cause of action asserted by one of the plaintiffs, as a taxpayer, pursuant to Section 51 of the General Municipal Law.*** "

Taken literally, the opinion of the court below in the case at bar would have to mean that no taxpayer would have standing to bringa taxpayer's action:

Furthermore, standing to sue under Section 51 of the General Municipal Law also constitutes standing under the Local Finance Law. This was judicially recognized in Petition of Board of Fire Commr's of Columbia-Litchfield Fire Dist. (Sup. Ct. Herk. Co. 1941) 29 N.Y.S. 2nd 605. Therefore plaintiff-appellant clearly has standing to contest, as a taxpayer, the validity of authorization of municipal obligations and expenditures for an illegal and unconstitutional use.

The argument that a representative action is not appropriate because of the possibility that other potential plaintiffs might desire to seek other remedies or might be subject to other defenses does not hold up when applied to plaintiff-appellant's standing as a taxpayer. The specific remedies for taxpayers injured by illegal uses of public funds lie in Section 51 of the General Municipal Law and, where such uses are to be effected by use of the municipal borrowing power, Sections 82 and 83 of the Local Finance Law. The defenses of municipal officers to such action must be in the proof of legality of purpose for such borrowing. Such defense could not be availed of with respect to one village taxpayer and not another.

CONCLUSION

The facts set forth in the verified complaint amply support the conclusion that the uses to which the proceeds of the obligations authorized by defendants-appellees shall be put are illegal and unconstitutional uses for public funds. The procedural limitations of Gaynor v. Rockefeller are not applicable to the direct use of public funds by a discriminatory municipal agency. A taxpayer should not be denied the remedies of contesting the validity of such obligations or seeking to prevent the acts of public officers in authorizing such obligations.

It is urged that the judgment of the Supreme Court, Rockland County, on this matter be reversed.

Respectfully submitted,

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Of Counsel

Findley v

Brown

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------------------------------------x
DAVID EVERETT,
Plaintiff, :

-against- :

RIVERSIDE HOSE COMPANY No. 4, INC., :
Defendant.
---------------------------------------x

66 CIVIL 1621

MEMORANDUM

TENNEY, J.

This is an action brought by a resident of Westchester County, New York, against defendant, a Volunteer Fire Company of the Volunteer Fire Department of the Village of Tarrytown in said county, arising out of the rejection of plaintiff's application for membership in said Company and declaring: that said rejection was wrongful, void and illegal; that plaintiff should be and is a duly elected member of said Company; and ordering defendant, its officers and members, to confirm and establish and to refrain from interfering with such membership.

Plaintiff alleges that his rejection for membership violates the provisions of Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983; 78 Stat. 246 (1964), 42 U.S.C. § 2000b (1964); 78 Stat. 252 (1964), 42 U.S.C. § 2000d (1964); the 14th Amendment of the Constitution of the United States;

Art. 1, § 11 of the Constitution of the State of New York; Article 15 of the Executive Law of the State of New York; and the Governor's Code of Fair Practice established by Executive Order on January 1, 1960.

Defendant has moved herein, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, to dismiss the action on the ground that this Court lacks jurisdiction over the subject matter, and on the further ground that the complaint fails to state a claim upon which relief can be granted.[1/]

Plaintiff has cross-moved, pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure, for summary judgment.

It would appear from the complaint herein that plaintiff, a 36 year-old Negro, is and has been a resident of Tarrytown, Westchester County, New York, for over twenty years; that he is and has been gainfully employed in said county, is of good physical and mental health, and has never been arrested or convicted of a crime.

The defendant is a membership corporation organized and existing under the Laws of the State of New York, and

Village of Tarrytown. All four white applicants were admitted to membership but plaintiff was denied membership without any reason given therefor by defendant.

Plaintiff alleges, upon information and belief, that the vote against his admission was 27-to-5,[2/] and that his application was rejected solely because he was a Negro, that no previous applicant has been denied membership in defendant, and, further, that no Negro has ever been a member of defendant during its entire existence, nor, in fact a member of any company of the Volunteer Fire Department of the Village of Tarrytown. Finally, he alleges that for the reasons hereinafter set forth, volunteer fire departments are quasi-governmental agencies of the State of New York.

Although the plaintiff does not specify the particular grounds for the jurisdiction of this Court, it seems clear that he is predicating such jurisdiction on Title 28 U.S.C. § 1343(3) (1964) which grants to the Federal district courts original jurisdiction of any civil action authorized by law to be commenced by any person:

> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right,

Village of Tarrytown. All four white applicants were admitted to membership but plaintiff was denied membership without any reason given therefor by defendant.

Plaintiff alleges, upon information and belief, that the vote against his admission was 27-to-5,[2] and that his application was rejected solely because he was a Negro, that no previous applicant has been denied membership in defendant, and, further, that no Negro has ever been a member of defendant during its entire existence, nor, in fact a member of any company of the Volunteer Fire Department of the Village of Tarrytown. Finally, he alleges that for the reasons hereinafter set forth, volunteer fire departments are quasi-governmental agencies of the State of New York.

Although the plaintiff does not specify the particular grounds for the jurisdiction of this Court, it seems clear that he is predicating such jurisdiction on Title 28 U.S.C. § 1343(3) (1964) which grants to the Federal district courts original jurisdiction of any civil action authorized by law to be commenced by any person:

> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right,

> privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . .

Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964) provides:

> Civil action for deprivation of rights.
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Plaintiff also bases his cause of action on 78 Stat. 246, 252 (1964), 42 U.S.C. §§ 2000b and 2000d (1964). However, in view of my determination herein that he has adequately stated a cause of action under Section 1983 of said Title 42, it is unnecessary to consider the adequacy or propriety of his claims under the other abovementioned statutes.[3/]

Of course, for the purposes of defendant's motion under Rule 12(c), the well-pleaded allegations of the complaint must be accepted as true, as well as the reasonable inferences flowing therefrom. Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y.), aff'd, 294 F.2d 415 (2d Cir. 1961). In other words, we must assume that plaintiff, who satisfies the age and residence requirements for membership,[4] is in good physical and mental health, is gainfully employed, and is without any criminal record, was denied membership in a Volunteer Fire Company after having been duly sponsored by a member thereof, and that the denial of membership was solely because he was a Negro, no Negro ever having been elected to membership in said Fire Company.[5]

Defendant argues that plaintiff was rejected pursuant to the Constitution and By-Laws of defendant--more particularly Article VII, Section 2, of said Constitution, which provides that: "In the event that there are three or more negative ballots cast by those members present and voting, the applicant shall be declared rejected; otherwise, the applicant shall be declared elected . . . . "; and that "the rejection of plaintiff was not a corporate action as such, but the action of members in the exercise of the lawful prerogative which they possess in voting upon membership." (Defendant's Reply Memo. P. 13.) Accordingly, it is defendant's contention that in acting upon plaintiff's application for membership, defendant was not performing any governmental or state function, or acting in any capacity in furtherance or enforcement of any state law, statute, ordinance, regulation, custom or usage, nor did it deprive plaintiff of any right under color of any state law, statute, ordinance, regulation, custom or usage.

Defendant's argument would have some validity if we were dealing with a purely social or benevolent organization occupying or utilizing private property and performing no governmental or quasi-governmental function or receiving no governmental assistance. This, however, is not the present case for it can hardly be denied that a voluntary fire department is performing a function normally governmental in nature.

This particular defendant was organized under special provisions of the Membership Corporations Law, Section 11(4), which require the consent of the majority of the village trustees (who are elected public officials) (N.Y. Village Law § 4-406(6)), after a public hearing.

Election to membership is provided for under § 202-a of the N.Y. Village Law, which states that such "election shall be pursuant to the by-laws, if any, of the fire company; otherwise, by a three-fourths vote of the members of the fire company present and voting at a regular or special meeting thereof." Such election is subject to the approval of the Board of Fire Commissioners, who, among other things, may, subject to the approval of the Board of Trustees, adopt rules for the admission of members of the Fire Department. N.Y. Village Law § 200(5).

It is conceded, not only for the purposes of this motion, but in fact by defendant's answer, that defendant's fire houses are built, owned and operated by the Village of Tarrytown, that its fire equipment is purchased and owned by said Village, and that the members of defendant are entitled to a reduced assessment of $500 on their homes for the purpose of Village real estate taxes (N.Y. Real Property Tax Law §§ 464, 466). After a term of service in the Village fire department a volunteer fireman is entitled to a certificate of service entitling him to benefits under the N.Y. General Municipal Law §§ 200 et seq. Furthermore, a volunteer fireman is exempt from jury duty (N.Y. Judiciary Law § 507(5)) and is entitled to free transportation and the use of telegraph lines and telephones under certain defined circumstances (N.Y. General Munic. Law § 206) and to other substantial benefits (N.Y. Civil Service Law - Article VI).

Certain privileges, such as the right to engage in fund-raising activities and to use its equipment in connection with such fund drives, are granted to a fire company under the law. N.Y. Membership Corps. Law § 112; N.Y. General Municipal Law § 204-a.

Nor does the fact that defendant is in large measure composed of non-salaried firemen affect its status as a publicly-owned or governmental facility. Williams v. Rescue Fire Co., 254 F. Supp. 556 (D. Md. 1966). See also Sikora v. Steinberg, 40 Misc.2d 649, 243 N.Y.S.2d 766 (Sup.Ct. 1963), aff'd mem., 249 N.Y.S.2d 401 (2d Dep't 1964).

Whether we denominate plaintiff's desired membership in the Fire Company as a "right" or a "privilege", it cannot be denied him arbitrarily or discriminatorily.

"We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

It cannot be said that a volunteer fireman is not a public servant because he receives no salary but rather is entitled to certain statutory benefits and exemptions.[6] Indeed, by statutory implication, a volunteer fireman is in "the public service" (N.Y. Civil Service Law § 86) although not a "public officer" (N.Y. Public Officers Law § 3(5)), and for the purposes of workmen's compensation he has the status of an employee (N.Y. Volunteer Firemen's Benefit Law § 2).[7] It cannot be denied that a statute excluding one from employment solely on racial grounds would be unconstitutional. By the same token,

> though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. *Hopkins*, 118 U.S. 356, 373-74 (1886). A corporate charter is not the creation of the corporation, but a grant pursuant to the sovereign power of the state. In promulgating its rules for admission to membership, defendant is exercising a power granted by the State, more specifically § 202-a of the N.Y. Village Law. Since the by-laws of a New York membership corporation may not make provisions inconsistent with law (*Davids* v. *Sillcox*, 297 N.Y. 355, 79 N.E.2d 440 (1948)), if the alleged discriminatory practices were written into the constitution or by-laws they would clearly be wholly void and without effect. What cannot here be done in print cannot be done in practice. The object for which defendant was formed is "The protection of life and property from fire" (Preamble to defendant's Constitution) which is a matter of public concern, for the public good, and for the general welfare of the State. The fact that defendant may consider itself a private social club and the acts of its members as those of private citizens is beside the point. *Williams* v. *Rescue Fire Co.*, *supra*. A membership or private corporation exercising a governmental or quasi-governmental function is not an instrument to be employed with impunity in disregard of constitutional guarantees. *Farmer* v. *Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964); *Anderson* v. *Moses*, 185 F. Supp. 727 (S.D.N.Y. 1960). Defendant's property and equipment were purchased out of public funds and it solicits funds from the public. *Kerr* v. *Enoch Pratt Free*

Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945). Its powers and functions are governmental in nature (Evans v. Newton, 382 U.S. 296, 299 (1966)), since a fire department "traditionally serves the community." (Id. at 302.) When defendant's members vote on applicants for membership they vote as voluntary firemen, not as members of a social club, and the State is involved in their vote. Williams v. Rescue Fire Co., supra at 562.

Accordingly, it may not "by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, creed, color or national origin."[8/] Plaintiff, in effect, alleges that defendant Fire Company has done so in his case. It is not up to this Court at this time to determine whether he can sustain his charges, but solely to determine whether he has set forth a claim upon which relief can be granted by this Court.

I hold that his complaint is sufficient to withstand defendant's motion for a judgment of dismissal on the pleadings.

The suggestion is made by defendant (Defendant's Reply Memo. Pg. 10) that plaintiff's remedy is by complaint to the State Commission for Human Rights. N.Y. Executive Law - Art. 15 §§ 290-301. Plaintiff, however, is asserting that defendant has deprived him of rights protected by the Fourteenth Amendment. Such claims are entitled to be adjudicated in the federal courts. McNeese v. Board of Education, 373 U.S. 668, 674 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1961).

In view of the foregoing determination, it becomes necessary to consider plaintiff's motion for summary judgment. The charge of discrimination which plaintiff makes is a serious one and is disputed and contested by defendant. While sufficient is alleged to overcome a motion under Rule 12, there is a serious and genuine issue as to whether there was discrimination. The record is not clear as to the number of Negro applicants, if any, who have unsuccessfully sought admission to membership, or as to the racial composition of the Village of Tarrytown. The issue of discrimination is not to be decided on affidavits, or depositions, or excerpts from depositions, but in the courtroom.

Defendant's motion for judgment of dismissal pursuant to Rule 12(c) and plaintiff's cross-motion for summary judgment pursuant to Rules12(c) and 56 are accordingly denied.

It is so ordered.

Dated: New York, New York.
October 17, 1966.

CHARLES H. TENNEY
U.S.D.J.

DAVID EVERETT, Plaintiff

-against-

RIVERSIDE HOSE COMPANY No. 4, INC.,
Defendant.

66 CIV. 1621

FOOTNOTES

1/ Pg. 2. Although characterized as a motion to dismiss, it is actually a motion for judgment on the pleadings, since defendant has answered the complaint.

2/ Pg. 4. If this were true, absent the provisions of Article VII, Sec. 2, of defendant's constitution, plaintiff would have been entitled to election under N.Y. Village Law § 202-a(2), having received a three-fourths vote of the members present and voting.

3/ Pg. 5. It seems entirely possible that plaintiff at trial may submit sufficient proof that defendant maintains "public accommodations" and that "segregation of these facilities has been supported by state action in violation of the rights given by the Fourteenth Amendment and by the Civil Rights Act of 1964." *Williams* v. *Rescue Fire Co.*, 254 F. Supp. 556, 563 (D. Md. 1966). Use of defendant's recreational facilities is limited to members under defendant's constitution and by-laws (Art. IX, Sec. 1). Plaintiff's right as an individual to maintain an action under 78 Stat. 246 (1964), 42 U.S.C. § 2000b (1964) is available under 78 Stat. 246 (1964), 42 U.S.C. § 2000b-2 (1964).

4/ Pg. 6. N.Y. Village Law §§ 202-a and 209.

5/ Pg. 6. Purposeful discrimination may not be assumed or merely asserted but must be proven, the quantum of proof necessary being a matter of federal law. *Swain* v. *Alabama*, 380 U.S. 202, 205 (1965). However, from the facts assumed herein, an inference of discrimination could reasonably be drawn.

FOOTNOTES

6/ Pg. 10. "One of the finest traditions of American community life is the service which people render to others without remuneration. Volunteer firemen have long been in the forefront of this group." N.Y. Volunteer Firemen's Benefit Law § 2.

7/ Pg. 10. While perhaps superfluous, § 291(1) of the N.Y. Executive Law declares that "the opportunity to obtain employment without discrimination because of race, creed, sex, color or national origin is hereby recognized as and declared to be a civil right."

8/ Pg. 12. The quoted language from § 43 of the N.Y. Civil Rights Laws dealing with labor unions seems particularly apt herein.

~~kx~~ 1 & 2 copies - Draft
Legal cap

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
---x

Plaintiff,

-against-

THE VILLAGE OF NYACK, NEW YORK,
as Mayor, and
,
,
,
, Trustees
of said Village.

Defendants.

---x

Plaintiff, complaining of the defendants by Kopald, Haft & Mandel her attorneys, respectfully alleges,

1. That the plaintiff at all times hereinafter mentioned was and now is a resident and duly qualified elector of the Village of Nyack, New York, and the owner of real property situate in the Village of Nyack, New York, consisting of a house and lot known and designated upon the assessment roll of said village as No. Street; that such real property so ~~w~~ owned by the plaintiff was at such times and now is duly assessed upon the assessment roll of said village and the same was duly assessed upon the latest village assessment roll, to wit, the 196~~5~~6 assessment roll at the sum of $., and ~~that~~ the plaintiff is liable to pay taxes upon such assessment to the village of Nyack. and further

class action that he is a member of a class to wit members of the Negro race who are taxpayers of the village of Nyack

2. That the defendant , herein was at all times hereinafter mentioned and now is the duly qualified and acting mayor of the village of Nyack, New York. That the defendants,

were then and now are ~~respectively~~ the trustees of said village.

3. That on or about the day of February, 1966, the defendant Mayor and trustees of said Village of Nyack, acting as a Board of Trustees and consti

constituting the Finance Board of the Village within the meaning of the Local Finance Law of the State of New York, did pass a bond resolution ~~dated~~

, 1966, authorizing the issuance and sale of serial bonds of the said Village of Nyack in the amount of $ for the purpose of purchasing ~~the~~ certain fire fighting equipment, to wit; ~~(a)~~

delivery to and for the use of the Village of Nyack Fire Department through and by one of its constituent companies.

4. That pursuant to the statutes in such cases made and provided, the aforesaid resolution was subject to a permissive referendum and pursuant to statute, defendants, upon their own motion caused the said resolution to be submitted for approval by the electors of the said village. Thereupon, a proposition was prepared and submitted at a village election duly called and held in the Village of Nyack on the 15th day of March, 1966.

5. Following the holding of the election aforesaid, a certificate of election upon the proposition was filed certifying that the results of the said election ~~xxxx~~ were votes in favor of the proposition, and ~~xx~~ votes against the proposition.

6. That thereafter on the 18th day of March, 1966, the aforesaid resolution together with the certificate in form provided by the Local Finance Law~~s~~ of the State of New York, was published in the Nyack Journal-News, the official newspaper~~s~~ of the said Village of Nyack, and this action is commenced within twenty (20) days from the date of said publication.

7. That the Fire Department of the Village of Nyack is a public municipal agency of the defendant Village of Nyack, & is required to serve ~~serving~~ all persons in said community ~~[illegible]~~ including [illegible] said members of [illegible]

8. That there are no ~~legal~~ Negro members of the said Fire Department or its constituents companies, ~~x~~ nor upon information and belief has there ever been a Negro member ~~member~~ of said Fire Department or its constituent companies.

9. That the said Village of Nyack Fire Department and its ~~do willfully and deliberatel~~ constituent companies ~~have~~ adopted ~~and maintained~~ and do willfully and deliberately maintain a systems or procedures whereby ~~a~~ members of the Negro race otherwise duly qualified ~~from becoming members of the said Fire Department~~ are prevented & prohibited from becoming such members or its constituent companies solely by

reason of their color or race.

10. That upon information and belief, about 30% of the population of the Village of Nyack are members of the Negro race and among said 30%, there are ~~several~~ Negroes who have attempted to and could or would become members of the said Village Fire Department ~~and~~ or its constituent companies, except for the discriminat~~ion~~atory practices in the admission of members set forth ~~described~~ above.

11. That by reason of the foregoing, the Negro ~~members-~~ residents of the Village of Nyack have been illegally and improperly deprived and ~~are deprived~~ continue to be deprived of ~~their~~ rights comparable to those held by white residents of said village, in that they cannot ~~to~~ become members of the said Fire Department and its constituent companies solely by reason of their color or race, all ~~and~~ in violation of the Statutes of the State of New York, the Constitution of the State of New York, and the laws and Constitution of the United States of America.

12. That by reason of the foregoing, the aforesaid bond resolution, its ~~the~~ approval at the special election ~~for~~ aforesaid and the serial bonds to be issued as provided for in the aforesaid bond resolution are and will be invalid, illegal, unconstitutional and void, in that (a) they ~~were~~ will require~~d~~ the use of public funds ~~and~~ in the repayment of said bonds for the ~~foster~~ furtherance of ~~on the basis~~ the purposes of a public agency which discriminates in its membership solely ~~by~~ on the basis of a ~~reason of the~~ person's color or race, (b) They ~~It~~ require~~s~~ the plaintiff and other Negro taxpayers of the Village of Nyack to bear a proportionate burden of the repayment of said bonds for the purposes of said fire department and its constituent companies while denying to the Negro taxpayers of the Village of Nyack the right to participate as members of said Fire Department and constituent companies solely by reason of their color or race. (c) That such obligations were authorized for an object or purpose for which the defendant village is not authorized to expend money. (d) That ~~xxx~~ such obligations were authorized in violation of the statutes of the State of New York, the applicable provisions of the Constitution of the State of New York, and the applicable provisions of the Constitution of the United States of America.

(a) the funds obtained from the sale thereof will be used to subsidize, maintain a segregated and discriminatory public agency in that said Fire Department ~~refuses~~ and refuses ~~to~~ defendant Negroes to belong as stated a foreword

13. That the plaintiff has no ~~adw~~ adequate remedy at law and the class.

WHEREFORE, plaintiff demands judgment annulling and setting xxxxx aside the aforesaid bond resolution and the special election of the Village of Nyack held on March 15th, 1966 pursuant thereto, restraining and enjoining the defendants xx and each and every one of them from the issuance of the serial bonds pursuant to the aforesaid bond resolution and for such other and further relief as to the Court may seem just and proper altogether with the costs and disbursements of this action.

KOPALD, HAFT & MANDEL
Attorneys for Plaintiff
Office & P. O. Address
176 Main Street
Highland Falls, New York

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on **February 20,1967**

~~HON. GEORGE J. BELDOCK, *Presiding Justice*~~
HON. HENRY L. UGHETTA **Acting Presiding Justice**
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
~~HON. SAMUEL RABIN~~
HON. JAMES D. HOPKINS
~~HON. A. DAVID BENJAMIN~~
HON. FRED J. MUNDER

Associate Justices

Christine Brown Findley, etc.,
Appellant,

v.

The Village of Nyack et al.,

Respondents.

Order on Appeal
from Order

In the above entitled cause, the above named Christine Brown Findley, etc., plaintiff,

having appealed to this court from ~~xxxxxxxx~~ an order

of the Supreme Court, Rockland County, dated July 25,1966, and judgment entered July 29,1966 pursuant thereto;

and the said appeal having been argued by

Pierre A. Tonachel, Esq., of counsel for the appellant, and

by Samuel Miller, Esq., of counsel for the respondents,

and due deliberation having been had thereon; and upon this court's

decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order and judgment ~~insofar as~~ appealed from ~~is hereby~~ are hereby unanimously affirmed, with one bill of $10 costs and disbursements.

Enter:

HERMAN M. POGUL

Clerk of the Appellate Division

Rockland County CORE

March 28, 1968

Dear Sir;

Racial Discrimination in the admittance policies of the Volunteer fire companies of the suburban communities of the state of New York has become an urgent problem. This problem exists in a very flagrant manner in Rockland County especially in the Nyack area. The Rockland County chapter of The Congress of Racial Equality is hereby requesting that you give the utmost support to all legislation designed to eliminate these discriminatory practices. We are also urging that you introduce legislation, if necessary to deal effectively with this practice.

Very sincerely

Charles W. James D.D.S. - chairman

Rockland County C.O.R.E.

CC. to
Joseph St Lawrence
Stephan Doig
Clinton Domenick

TO ABOLISH RACIAL DISCRIMINATION BY DIRECT NONVIOLENT ACTION

Rockland County CORE

March 29, 1966

Dear Sirs;

The Rockland County branch of the Congress of Racial Equality is hereby requesting that the Rockland County Board of Supervisors cease the appropriating and allocation of county funds to volunteer fire departments and companies who openly exclude Negroes from membership under the guise of their status as private membership corporations. Although the Board of Supervisors does not have the legal power to end these practices by direct order, we feel that a strong indication by the board that future allocations would depend on the correction of these discriminatory practices, would go a long way toward correcting this situation. The question of fire company discrimination is one of long standing in this county. We feel that in the light of present day thinking, definite steps must be taken at this time to put an end to it. Although the same condition exists in other parts of the state, we, as residents, are directly concerned with it here. Mr Carl Rachlin, the Legal counsel of National CORE has requested that we forward your board this letter because obviously if the allocation of public funds to these companies is continued, there will have to be some legal test of the validity of these practices.

very sincerely

Charles Y. James D.D.S. - chairman

Rockland County C.O.R.E.

TO ABOLISH RACIAL DISCRIMINATION BY DIRECT NONVIOLENT ACTION

Racklin [illegible]

LAW OFFICES
KOPALD, HAFT & MANDEL
MARINE MIDLAND BANK BUILDING
HIGHLAND FALLS, N. Y. 10928

ABRAHAM KOPALD
WILLIAM J. HAFT
MYRON I. MANDEL

Ned Kopald

HIGHLAND FALLS 6-4764
AREA CODE 914

APR 4 1966

April 1, 1966

Congress of Racial Equality
38 Park Row
New York, New York

Attn: Mr. Carl Racklin, Counsel

Dear Mr. Racklin:

Enclosed is a copy of the complaint which I am arranging to have served on the Village of Nyack on Monday, April 4th, 1966.

Your comments on this matter will be greatly appreciated and I trust that I may take advantage of your kind offer of assistance as this matter progresses.

With kindest regards, I remain

Very truly your s,

Myron I. Mandel

MYRON I. MANDEL

MIM/w
Enc.

APR 22

LAW OFFICES
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MARINE MIDLAND BANK BUILDING
HIGHLAND FALLS, N. Y. 10928

ABRAHAM KOPALD
WILLIAM J. HAFT
MYRON I. MANDEL

HIGHLAND FALLS 6-4764

April 21, 1966

Gerald R. Kane, Esq.
5 Fourth Street
Haverstraw, New York

Re: Findley v. Village of Nyack
Our file No. 7650

COPY

Dear Jerry:

In reference to the above matter and pursuant to your request, I enclose herewith the original and one copy of our stipulation extending your time to answer the complaint to May 9th, 1966.

With kindest regards, I remain

Very truly yours,

MYRON I. MANDEL

MIM/w
Enc.

cc.: Carl Rachlin, Esq.
38 Park Row
New York, New York

P. S. Dear Carl:
The above is self-explanatory.

In looking through the file, I realize that I had not sent you a copy of the complaint in its final form as I had promised to do. A copy of the complaint is enclosed. I will be in touch with you as the matter progresses.

With kindest regards, I remain

Very truly yours,

MYRON I. MANDEL

MIM/w
Enc.

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WILLIAM J. HAFT
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NED KOPALD

HIGHLAND FALLS 6-4764
AREA CODE 914

MAY 17 1966

May 16, 1966

Carl Rachlin, Esq.
Congress on Racial Equality
38 Park Row
New York, New York

Re: Findley v. Village of Nyack
Our file No. 7650

Dear Carl:

Enclosed is a copy of the motion papers served on me on May 16th, 1966 in the above matter.

I have asked for an adjournment of the motion for about two weeks and feel certain that it will be granted. In the meantime, I would like to make an appointment to review the motion with you at your office some time next week, perhaps next Thursday or Friday. Please call me so that we can arrange a mutually convenient appointment.

I have just received the motion papers and looked through them very quickly. I am not particularly concerned with paragraph one as our action is based on the Public Finance Law rather than the General Municipal Law. It is paragraphs two and three which we will have to discuss.

With kindest regards, I remain

Very truly yours,

My Mandel

MYRON I. MANDEL

MIM/w
Enc.

fudly Nyack

LAW OFFICES
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HIGHLAND FALLS, N.Y. 10928

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WILLIAM J. HAFT
MYRON I. MANDEL
NED KOPALD

HIGHLAND FALLS 6-4764
AREA CODE 914

June 27, 1966

JUN 28 1966

Carl Rachlin, Esq.
38 Park Row
New York, New York

Re: Our file No. 7650

Dear Carl:

Forgive the delay in my reporting to you the results of the motion in the above matter on Monday, June 20, 1966 in the Rockland County Supreme Court. On Tuesday, June 21, I became ill and have only today returned to the office.

The hostility to my client and our point of view in this matter was unspoken and unmistakable on the return of the motion. This was a new experience for me and a jarring one which I would like to talk to you about some time. In any case, my memorandum of laws was not prepared at the return of the motion because the reply affidavit had not been served upon me until the Friday afternoon before. I asked the Judge on the 20th for a week to submit my memorandum and fully believe that in almost any other case, this request would have been granted without question. In this case, however, the Judge, after a great deal of reluctance and argument, finally gave me until Wednesday morning to submit my memorandum. Hence, my memorandum which I had to then draw and have typed within about 24 hours (not to mention feeling "crumby" because of my ensuing illness) is not as good as it could have been and should have been. In any case, it was filed on Wednesday morning and a copy is enclosed.

I fully expect that we will have to go to the Appellate Division on this motion which I suppose might have been the result in any case. I still have my "fingers crossed", however, and will call you as soon as I receive the Judge's decision.

Please thank Leslie Shapiro for her memo on the deposition of witnesses. It will be of great help when and if we reach that point in the lawsuit.

With kindest personal regards, I remain

Very truly yours,

MYRON I. MANDEL

MIM/w
Enc.

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WILLIAM J. HAFT
MYRON I. MANDEL

914
HIGHLAND FALLS 6-4764

July 25, 1966

Dr. Charles W.James
7 Brookside Avenue
Nyack, New York

Mr. William A. Scott
c/o Broadway Market
15 N. Broadway
Nyack, New York

COPY

Re: Findley v/ Village of
Nyack
Our file #7650

Dear Dr. James & Mrs. Scott:

It has been about 10 days since I spoke to Dr. James about Judge Bailey's decision in the above matter. An order embracing Judge Bailey's decision was presented to Judge Bailey for his signature at his chambers in Cold Spring on July 15, 1966. After the Order is signed, it is then filed or entered in the Rockland County Clerk's Office and I will receive a copy of it and notice of its filing in the County Clerk's Office.

If an appeal is to be taken from Judge Bailey's decision, it must be taken within 30 days of the date in which the order is filed in the Rockland County Clerk's Office. I will be away from my office for a few days and it may be that I will receive notice of the entry of the order while I am away. For that reason, I am writing to you now as we can expect that the order will be entered very shortly and the time to appeal will begin to run.

July 29,

As I indicated to Dr. James on the telephone, it is my opinion that we have sound legal grounds for taking the appeal from Judge Bailey's decision. While I cannot give you any assurance as to the result of such an appeal, I do feel that the matter is of sufficient importance and the legal grounds of such a nature that an appeal should be taken. I would, therefore, strongly urge you to make your decision as to the appeal as soon as possible bearing in mind the time limit under which we must operate. If you will then let me

Fudler v Brown

COPY

know of your decision, I can proceed with the necessary papers at once.

I also spoke to Dr. James about our retainer fee of $500.00. You will recall that we discussed this when we first met in Nyack and that we again discussed it at Dr. James' Office before the motion was decided by Judge Bailey. I also discussed this matter with Carl Rachlin to whom I am sending a copy of this letter and Mr. Rachlin again reassured me that the National Office would pay all of the disbursements incurred in connection with the law suit and the appeal. On the strength of this assurance, I feel that the $500.00 retainer will cover my services already rendered and my work in the Appellate Division on the appeal which we now contemplate. I sincerely believe that this is a reasonable fee considering the time that has already been involved and will be involved in this proceeding. What it boils down to is simply this: I am sympathetic with your position and I believe in this lawsuit. Unfortunately, I am just not in a position to handle it for nothing. I often wish that I were in a position to handle all the lawsuits with which I am in agreement or with which I sympathize or which simply interest me regardless of whether I am going to be paid or not for my work, but unfortunately, this is not the case.

Please let me know what your decisions are concerning this matter so that if you decide to do so, we can promptly proceed with the appeal.

With kindest regards, I remain,

Very truly yours,

MYRON I. MANDEL

MIM:rab

cc: Carl Rachlin, Esq.
38 Park Row
New York City, New York

Werner Loeb, Esq.
17 N. Broadway
Nyack, New York

AUG 1 - 1966

LAW OFFICES
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ABRAHAM KOPALD
WILLIAM J. HAFT
MYRON I. MANDEL

HIGHLAND FALLS 6-4764

July 29, 1966

Dr. Charles W. James
7 Brookside Avenue
Nyack, New York

Mr. William A. Scott
c/o Broadway Market
15 North Broadway
Nyack, New York

COPY

Re: Findley v. Village of Nyack
Our file No. 7650

Dear Dr. James and Mr. Scott:

The order in the above matter dismissing plaintiff's complaint was entered in the Rockland County Clerk's Office on July 28, 1966.

Accordingly, we have thirty (30) days from the date of the entry of the order or until August 27, 1966 or, as a practical matter, until Friday, August 26, 1966 within which to file our Notice of Appeal.

It is imperative that you give this matter your immediate attention as the time will pass quickly. I also call to your attention that I will be on vacation during the weeks of August 8 and August 15 and will not return to my office until August 22. Please contact me during the week of August 1st and let me have your views on this matter so that if we are going to take an appeal, the Notice can be filed some time next week.

With kindest regards, I remain

Very truly yours,

MYRON I. MANDEL

MIM/w

cc.: Carl Rachlin, Esq.
38 Park Row
New York City, New York

cc.: Werner Loeb, Esq.
17 NorthBroadway
Nyack, New York

Nancy Miss McCarthy
BR 9-8484
re

CR spoke to Mandel 8/26/66 he will file notice of appeal

LAW OFFICES
KOPALD, HAFT & MANDEL
MARINE MIDLAND BANK BUILDING
HIGHLAND FALLS, N.Y. 10928

ABRAHAM KOPALD
WILLIAM J. HAFT
MYRON I. MANDEL
NED KOPALD

HIGHLAND FALLS 6-4764
AREA CODE 914

August 23, 1966

Carl Rachlin, Esq.
150 Nassau Street
New York, New York

Re: Findley vs. Village of Nyack

Dear Mr. Rachlin:

I have given considerable thought to my telephone conversations with you and with Dr. James on August 22, and I must confess that my conversation with Dr. James, in particular, disturbed me very much.

When I was first retained in this matter, I believe that I made it amply clear that I was not in a position to handle this matter without fee. At that time, and shortly thereafter at Dr. James' office, I indicated that I would require a $500.00 retainer in order to proceed with this matter through my work in the Appellate Division. Both Dr. James and Mr. Scott seemed to indicate to me that the local Chapter would make immediate arrangements to raise the necessary funds.

Immediately after our not unexpected unfavorable result in the Supreme Court, I wrote to Dr. James, Mr. Scott and you on July 25 advising Dr. James and Mr. Scott of the proceedings to be followed if an appeal was to be taken. On July 25 and again on July 29, I emphasized the need for either Dr. James or Mr. Scott to contact me immediately so that the necessary plans could be made and I again indicated my position in regard to the retainer which I felt was agreed upon. I never received a response from anyone to my letters of July 25 or July 29, 1966.

When I spoke to Dr. James yesterday, he indicated that my retainer requirement would not or could not be paid by the local Chapter and that the most money that the Chapter could pay in connection with this suit was $100.00. As I am sure you will appreciate, this position of Dr. James places me in a position of having to decide whether I am willing to handle this matter without fee or not.

I, quite frankly, feel that the conduct of the Nyack Chapter of CORE has placed me in a very unfair position. No attorney likes to be placed in a position where he must say that he cannot proceed with a lawsuit because he has not received his fee, especially when the lawsuit is one in which he has much sympathy and interest. At the same time, I consider it grossly unfair for an organization to expect a local attorney to handle a matter for nothing after misleading him into believing that the fee would be paid. To be advised at this stage that my fee requirements cannot or will not be met must seriously impair my confidence in the sincerity of those who retained me and reluctantly leads me to the conclusion that I cannot represent the plaintiff in this matter.

It may be that Dr. James' position on the telephone is the result of some dissension within his local organization in regard to the lawsuit. If this is so, it should have been made clear to me at the beginning, and is an additional reason why I do not feel I can continue to act in this matter.

As you know, the Notice of Appeal must be filed on or before August 27, 1966. In view of the fact that you have acted as co-counsel with me, I do not anticipate that there will be any difficulty in meeting the deadline if it is your intention to proceed with the appeal. I believe that you have copies of all the papers and pleadings in this matter, but if there are any that you are missing, please do not hesitate to contact me and I will cooperate with you in any way that I can.

I regret that I cannot continue to represent the plaintiff in this interesting and important lawsuit.

With kindest regards, I remain

Very truly yours,

MYRON I. MANDEL

MIM/w

cc.: Dr. Charles W. James

cc.: Mr. William A. Scott

cc.: Werner Loeb, Esq.

LAW OFFICES
KOPALD, HAFT & MANDEL
MARINE MIDLAND BANK BUILDING
HIGHLAND FALLS, N. Y. 10928

ABRAHAM KOPALD
WILLIAM J. HAFT
MYRON I. MANDEL

NED KOPALD

HIGHLAND FALLS 6-4764
AREA CODE 914

August 26, 1966

Carl Rachlin, Esq.
150 Nassau Street
New York, New York

Re: Findley v. Village of Nyack, et al
Our file No. 7650

Dear Mr. Rachlin:

In accordance with our telephone conversation, I have this day filed the original of the enclosed Notice of Appeal in the Rockland County Clerk's Office and served a copy of the same on Samuel Miller, attorney for the defendants.

I also enclose photocopy of the Order and Judgment entered in this matter.

With kindest regards, I remain

Very truly yours,

MYRON I. MANDEL

MIM/w
Enc. 3

September 8, 1966

Pierre Tonachel} Esq.
Uphan & Meeker
405 Lexington Avenue
New York, New York

Re: Findley v. Nyack

D

Dear Pierre:

Thank you for agreeing to write the brief in the above entitled matter. I enclose a copy of the complaint, a notice of motion to dismiss under Rule 3211, the order of the Court granting the motion to dismiss signed by Judge James W. Bailey of the Supreme Court of the State of New York, Rockland County and the Notice of Appeal dated August 26, 1966.

I am obtaining a copy of the opinion but the case relies almost entirely on the theory that the plaintiff is not a proper party plaintiff in that she is not a person affected by the discriminatory practices of the Village Fire Department. The Gaynor case is the one on the basis of which the motion was granted.

Obviously, we will help you in any way we can with additional research or whatever you think ought to be done.

With warm regards,

Sincerely yours,

Carl Rachlin
General Counsel

CR/vh

September 21, 1966

Pierre A. Tonachel, Esq.
Uphan & Meeker
405 Lexington Avenue
New York, New York

Re: Findley v. Village of Nyack, et al

Dear Pierre:

Enclosed is a copy of the decision of Judge James W. Bailey of the Supreme Court of Rockland County in the above entitled case. If there is anything further you wish please let me know. There was never any record on appeal since the whole issue arose on a motion to dismiss to dismiss the complaint. There has never been any testimony taken at any time as yet.

With warm personal regards.

Sincerely yours,

Carl Rachlin
General Counsel

CR:tp
Ecnl.

Findley v Nyack file

September 26, 1966

Carl -

I return your copy of the opinion in Findley vs. Village of Nyack.

I find we should file briefs & record by October 20 to make the December term of court and I'm going to try to get something up in time.

As I see it, our best line is §§ 82-83 of Local Finance Law: there don't seem to be any contrary precedents. I think we should try to distinguish Gaynor on §51 of General Municipal Law, too - unless you feel this would only dilute our position (there is the problem of the bond to be posted).

I'll discuss it further when I get some feel of the Local Finance Law cases. Have you used that theory in any other recent actions?

Best regards,

- Reis

Fudly
v
Nyack

November 16, 1966

Hon. Robert Slocum, Chairman
Rockland County Board of Supervisors
New City, New York

Dear Sir:

We have been advised that the County Board of Supervisors has voted to take the necessary steps to acquire a site for the training of volunteer firemen in Rockland County.

As you know, there are only a few Negro volunteer firemen in the entire County. As has been referred to previously, this is the result of discrimination on the part of the Departments. In order to terminate this unconstitutional and unconscionable conduct, we desire that you declare that no Fire Department, nor any any of its members, in Rockland County be permitted to participate in the County training program unless that Department gives proper assurances that they have stopped discriminatory conduct. Tokenism, of course, does not constitute an end to discrimination, but in reality is a continuation of that discrimination.

We trust that you will agree that this is a reasonable approach and that it will be satisfactory to the Board of Supervisors.

May we have a prompt reply?

Very truly yours,

Carl Rachlin
General Counsel

CR:ns

call:
Wm. Scott
+ [illegible]

Nyack - 358 - 0358

ROCKLAND COUNTY
BOARD OF SUPERVISORS
NEW CITY, N. Y. 10956

ROBERT P. SLOCUM
CHAIRMAN
FRANK ESTABROOK
CLERK

NEW CITY 4-4911

November 18, 1966

Mr. Carl Rachlin
General Counsel
Scholarship, Education and
Defense - Fund for
Racial Equality, Inc.
150 Nassau Street
New York, New York 10038

Dear Sir:

The office of the Rockland County Board of Supervisors is in receipt of your letter dated November 16, 1966.

I am writing to inform you that Mr. Slocum, Chairman to the Board, is out of town and not expected to return until November 30th.

Very truly yours,

Valerie Machold

Valerie Machold
Deputy Clerk to Board

vem

November 29, 1966

Pierre A. Tonachel, Esq.
Upham & Meeker
405 Lexington Avenue
New York, New York

Dear Mr. Tonachel:

Enclosed is the brief and appendix, as well as the note of issue, for Findley v. Nyack. I have been informed by the Appellate Division, Second Department that only by checking the Law Journal can one find out on which day the argument will be heard. All we know is that the argument will occur during the January Term, which begins January 4, 1967. If you have any questions or requests, Mr. Rachlin hopes that you will not hesitate to contact us.

Yours truly,

Stephen Schlakman

SS:ns

December 12, 1966

Miss Valerie Machold
Deputy Clerk to Board
Rockland County Board
of Supervisors
New York, N.Y. 10956

RE;

Dear Miss Machold:

On November 18th you were good enough to write to me advising that Mr. Slocum, Chairman of the Board, would be returning on or about November 30th. Since I have not yet heard from Mr. Slocum, would you advise me whether my letter to him of November 16th has been brought to his attention. We are anxious for an expression from Mr. Slocum regarding the Fire Department in Nyack so that this problem may be resolved without further litigation.

Very truly yours,

Carl Rachlin
General Counsel

CR:gtc

ROCKLAND COUNTY
BOARD OF SUPERVISORS
NEW CITY, N. Y. 10956

ROBERT P. SLOCUM
CHAIRMAN
FRANK ESTABROOK
CLERK

NEW CITY 4-4911

DECEMBER 15, 1966

MR. CARL RACHLIN
GENERAL COUNSEL
FUND FOR RACIAL EQUALITY
150 NASSAU STREET
NEW YORK, NEW YORK

DEAR MR. RACHLIN:

I HAVE YOUR LETTER OF DEC. 12 ADDRESSED TO MISS MACHOLD REGARDING FUNDS FOR THE PROPOSED FIRE TRAINING SITE.

PLEASE BE ADVISED THAT YOUR EARLIER LETTER ADDRESSED TO MR. SLOCUM HAS BEEN PLACED ON THE AGENDA FOR THE MEETING OF THE ROCKLAND COUNTY BOARD OF SUPERVISORS SCHEDULED FOR TUESDAY, DECEMBER 20.

I WILL BE HAPPY TO COMMUNICATE THE BOARD'S ACTION FOLLOWING THAT MEETING.

IF THERE IS ANYTHING FURTHER I CAN DO FOR YOU PLEASE FEEL FREE TO LET ME KNOW.

SINCERELY,

Frank Strauss

FRANK STRAUSS
EXECUTIVE ASSISTANT

December 16, 1966

Mr. Frank Strauss
Executive Assistant
Rockland County
Board of Supervisors
New York, N.Y. 10956

RE: Volunteer Fire Department

Dear Mr. Strauss:

Thank you for your letter of December 15th. I would be pleased to come to the Board of Supervisors meeting on December 20th, if invited.

I think the problem of volunteer fire departments continuance to discriminate against minority peoples must be terminated. I'm sure the Board recognizes that it's not only improper to continue this discrimination but illegal and I would like to discuss this with the Board.

Sincerely yours,

Carl Rachlin
General Counsel

CR:gtc

[illegible]
Findley ✓
Brown

December 27, 1966

The Very Rev. Msgr. James F. Cox, Chairman
Rockland County Commission on Human Rights
Rockland State Hospital Chapel
Orangeburg, New York

Dear Monsignor Cox:

Please find enclosed a copy of a letter from Scholarship, Education and Defense, Fund for Racial Equality, pertaining to our proposed Fire [illegible] Training Site. This matter was brought up at the December 20th meeting of the Rockland County Board of Supervisors.

Subsequent to discussion, the Board is requesting that your Commission prepare a proposed set of rules and regulations governing the operation and training of fire and police training site which the Board of Supervisors may study.

If this office can be of any assistance to you in this matter, please do not hesitate to call.

Very truly yours,

Frank Estabrook

Frank Estabrook
Clerk

FE:mu
Enc.
cc: SEDF ✓
Fire Advisory Board
William J. Herman

LAW OFFICES
KOPALD, HAFT & MANDEL
MARINE MIDLAND BANK BUILDING
HIGHLAND FALLS, N.Y. 10928

ABRAHAM KOPALD
WILLIAM J. HAFT
MYRON I. MANDEL
NED KOPALD

HIGHLAND FALLS 6-4764
AREA CODE 914

December 29, 1966

Carl Rachlin, Esq.
150 Nassau Street
New York, New York

Re: Findley v. Village of Nyack et al

Dear Carl:

This morning my office received a copy of Enumerated Calendar for the January 1967 Term of the Appellate Division, Second Department. Numbers 430 and 431 on the Calendar are Findley against the Village of Nyack which I presume is the appeal you took from the order in the Supreme Court. In view of my disassociation with the case, I am surprised that I have received the calendar and am still apparently listed as the attorney of record. I presume that you are prosecuting this appeal and there is nothing for me to do in connection with this matter.

Incidentally, I presume you are aware of the recent decision in the United States District Court upholding a complaint under the Federal statutes involving the denial of membership in fire companies.

With kindest regards and best wishes for the Holiday Season, I remain

Very truly yours,

Myron I. Mandel

MYRON I. MANDEL

MIM/w

Dec

January 3, 1967

The Very Rev. Msgr. James F. Cox, Chairman
Rockland County Commission on Human Rights
Rockland State Hospital Chapel
Orangeburg, New York

Re:Findley vs. Nyack

Dear Monsignor Cox:

I am in receipt of a copy of a letter to you, from Mr. Estabrook, concerning the fact that we had been in communication with the Rockland County Supervisors regarding steps to be taken to make certain that the new Fire Training site will not be used for the purpose of continuing the discriminatory practices of many of the Fire Departments in Rockland County. I will be most happy to meet with you and any help I can give in solving and ending this discriminatory practice which unfortunately , still exists.

May I urge, that one of the regulations to be put into effect should require that no Fire Department may use county facilities until it has shown the steps taken to terminate this discriminatory practice. We would also urge that each community be instructed to take positive steps to make certain it's Fire Department no longer practices discrimination.

While the Fire Departments are voluntary, they are still instrumentalities of the town or city, county or state. Whatever legal rights some private organizations may have to continue discriminatory practices in private clubs, for example, no such right exists in a public instrumentality even to its corporate structure, be it in the form of a separate voluntary institution. I'm certain you are familiar with a case decided by the United States Supreme Court a few years ago, called Burton vs. Wilmington Parking Authority.

I would like to help in any way I can, to terminate these practices and I hope that you will call upon me.

We have pending for argument in January, a case in the Appellate Division of the Supreme Court, State of New York, entitled Findley vs. Nyack. Please let me know what you would like me to do.

Sincerely,

Carl Rachlin
General Counsel

CR:gn
CC: to Mr. Estabrook

January 6, 1967

Myron I. Mandel, Esq.
Copald, Haft & Mandel, Esqs.
Marine Midland Bank Building
Highland Falls, New York 10928

Dear Myron:

I did not realize that you did not want your name on the papers which we have filed with the appellate division. The case will be argued next week and of course there is nothing for you to do at all and don't concern yourself with it. I assumed however, from our last conversation, that you had no objection to remaining as counsel of record. If this is in error, please let me know.

Thank you for the information concerning the case in the United States District Court, we were aware of it and I hope it may be of some help to us. You ought to be advised that I have been in touch with the Board of Supervisors, concerning the new Fire Department training facilities for the county and I am hoping that we can make some useful progress in that regard.

Best wishes for a "HAPPY NEW YEAR "! Thank you for all you have done.

Sincerely yours,

Carl Rachlin
General Counsel

CR:n

ROCKLAND COUNTY
COMMISSION ON HUMAN RIGHTS

OFFICE
NE 4-4911

11 NEW HEMPSTEAD ROAD
NEW CITY, NEW YORK 10956

January 7, 1967

Mr. Carl Rachlin
Scholarship Education and Defense
Fund for Racial Equality, Inc.
150 Nassau Street
New York 10038, N.Y.

Dear Mr. Rachlin:

I wish to thank you for your letter of January 3rd. At a recent meeting of the various town and village Human Rights Commissions with the Rockland County Human Rights Commission, a draft of conditions under which the proposed fire training site could be used by fire companies was composed. This draft directed to eliminate discrimination in volunteer fire companies which wish to avail themselves of the fire school has already been presented to the Board of Supervisors.

I would like to take this opportunity to invite you to meet with our County Commission on the evening of January 23rd at 8:30 P.M. at the Rockland County Office Building, New Hempstead Road, New City, New York. Such a meeting would give us the opportunity to discuss the progress which each group has been able to make to date.

With every best wish, I remain

Sincerely in Christ

James F. C

Very Rev. Msgr. James F. Cox

JFC:mp

LAW OFFICES
KOPALD, HAFT & MANDEL
MARINE MIDLAND BANK BUILDING
HIGHLAND FALLS, N. Y. 10928

ABRAHAM KOPALD
WILLIAM J. HAFT
MYRON I. MANDEL
—
NED KOPALD

HIGHLAND FALLS 6-4764
AREA CODE 914

January 11, 1967

Carl Rachlin, Esq.
Scholarship, Education & Defense Fund
for Racial Equality, Inc.
150 Nassau Street
New York, New York 10038

Re: Findley v. Village of Nyack
File No. 7650

Dear Carl:

Thank you for your letter of January 6 concerning the above matter. I have no objection to remaining counsel of record, but would appreciate being kept advised of its progress.

With kindest regards and best wishes for the New Year, I remain

Very truly yours,

MYRON I. MANDEL

MIM/w

Findley v NYACR

February 21, 1967

Hon. Robert C. Meade
Town Attorney
Town of North Hempstead
Town Hall
Manhasset, New York

Dear Sir:

This is in reply to your letter of February 2, 1967 in which you requested an opinion as to whether the Town Board of the Town of North Hempstead, in entering into contracts with incorporated fire companies pursuant to Town Law Section 184, has the power to dictate the manner in which members of volunteer fire companies will be selected in order to prevent discrimination based upon race, creed, color or national origin. Your letter enclosed a copy of a January, 1967 report of the Nassau County Commission on Human Rights into membership practices of volunteer fire departments.

Town Law Section 176-b provides for the initial appointment of volunteer members in any newly organized fire company by the board of fire commissioners, and that thereafter, new members are to be elected pursuant to the by-laws of the fire company or by a three-fourth's vote of the members of the fire company present and voting at a regular or special meeting. The section further provides that "(t)he membership of any person so elected shall become effective when approved by resolution of the board of fire commissioners." In most towns, the town board acts as the board of fire commissioners. In towns outside of villages and fire districts, Membership Corporation Law Section 110, subd. 3 requires that "the election of a member must be confirmed by the town board of each town which consented to the formation of the fire corporation."

I have had occasion to deal with this subject in a prior opinion in which I pointed out that the responsibility of a board to approve or confirm the selection of new members in a volunteer fire company should involve more than a perfunctory act, and should include a consideration of their voting procedures and of their effects. 1963 Op. Att'y Gen. 211. I advised that although by-law providions for the admission of members in a volunteer fire company might appear on their face to be valid, they would be invalid if used to exclude anyone from membership on account of race, creed, color or national origin since such exclusionary practices would contravene Article I, Section 11 of the State Constitution as well as the public policy of this State as embodied in the New York Law Against Discrimination (Executive Law, Article 15) and the Governor's Code of Fair Practices established by Executive Order on July 15, 1960.

Subsequent to the issuance of that opinion, two Federal court decisions have held that racial discriminatory practices by volunteer fire companies would be violative of the Fourteenth Amendment to the Federal Constitution. In _Everett_ v. _Riverside Hose Company_, No. 4, Inc. 261 Fed. Supp. 463 (S.D.N.Y., 1966), Judge Tenney, in denying a motion to dismiss a complaint brought by a rejected Negro applicant against a volunteer fire company in Tarrytown, New York, stated (pp. 468-469):

> "Defendant's property and equipment were purchased out of public funds and it solicits funds from the public. Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (4th Cir.)., cert. denied, 326 U.S. 721 (1945). Its powers and functions are governmental in nature (Evans v. Newton, 382 U.S. 296, 299 (1966), since a fire department 'traditionally serves the community.' (Id. at 302) When defendant's members vote on applicants for membership they vote as voluntary firemen, not as members of a social club, and the State is involved in their vote. Williams v. Rescue Fire Co., (254 F. Supp. 556) at 562.
>
> Accordingly, it may not 'by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, creed, color or national origin.'"

In Williams v. Rescue Fire Company, 254 Fed. Supp. 556 (D. Maryland, 1966), it was held that the exclusion of any taxpayers for "social reasons" from the use of an arena and swimming pool, constructed and operated by a volunteer fire company and supported by taxpayers' funds, would fall within the prohibitions of the Fourteenth Amendment and the Civil Rights Act of 1964.

In view of the foregoing, it is my opinion that a town board in approving or confirming the selection of members in a volunteer fire company, or in entering into a contract with a volunteer fire company involving the use of public funds pursuant to Town Law Section 184, has the responsibility to insist that membership in such company be open to all qualified residents without regard to an individual's race, creed, color or national origin. If the town board finds that the by-laws of a volunteer fire company are being employed as a subterfuge to exclude individuals because of their race or religion, the town board should require such modification of the by-laws as is necessary to eliminate the discriminatory practice.

The Attorney General is authorized to render official opinions to officers and departments of the State government only. Necessarily, therefore, the foregoing must be understood to have been furnished to you informally and unofficially, with a desire to be of assistance to you. It is not to be considered a formal opinion of the Attorney General.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

Findley
v
Nyack

STATE OF NEW YORK
DEPARTMENT OF LAW
STATE OFFICE BUILDING
80 CENTRE STREET
NEW YORK 13, N. Y.
TELEPHONE: CORTLANDT 7-9800

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

February 24, 1967

Carl Rachlin, Esq.
Scholarship, Education and
Defense Fund
150 Nassau Street
New York, N.Y. 10038

Dear Mr. Rachlin:

Pursuant to our telephone conversation of February 23, I am enclosing a copy of our opinion to the Town Attorney of North Hempstead concerning the responsibilities of town boards over admission practices of volunteer fire companies and a copy of the bill that we have introduced in the Legislature seeking to eliminate discriminatory practices by volunteer fire companies.

Best wishes,

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By

George D. Zuckerman

GEORGE D. ZUCKERMAN
Acting Chief
Civil Rights Bureau

GDZ:pw
Enc.

SAMUEL MILLER
COUNSELOR AT LAW
90 NEW MAIN STREET
HAVERSTRAW, NEW YORK 10927

AREA CODE 914
429-5371

March 24, 1967

Kopald, Haft & Mandel, Esqs.
176 Main Street
Highland Falls, New York

Carl Rachlin, Esq.
150 Nassau Street
New York, New York

Re: FINDLEY, etc. v. THE VILLAGE OF
NYACK, et al.

Gentlemen:

I enclose herewith copy of Order of the Appellate Division affirming the Order and Judgment in the Supreme Court in the above entitled matter together with Notice of Entry thereof on February 20, 1967.

Very truly yours,

SAMUEL MILLER

SM:LL
Enc.
CERTIFIED MAIL
RRR

March 27, 1967

Pierre Tonachel, Esq.
405 Lexington Avenue
New York, New York

Re:Findley v Nyack

Dear Pierre:

I have a copy received today by certified mail from Samuel Miller, Esq., attorney for Nyack.

What are our expiration dates on time to appeal and I would like to sit down with you and discuss your thoughts on this. After you have had a chance to think about it let me know and I will come up to your office and meet you either for lunch or any other time convenient to you.

With warm personal regards.

Sincerely,

Carl Rachlin
General Counsel

CR:n

ROCKLAND COUNTY BUDGET - FISCAL YEAR 1966

CODE 81A

81A - FIRE BUREAU - FIRE ADVISORY BOARD	Appropriation 1965	Departmental Request 1966	Budget Officer Recommendation	1966 Budget As Adopted
100 PERSONAL SERVICES				
110 Salaries, Employees				
Part Time Typist	$ -	$ -	$ -	
Total Personal Services	$ -	$ -	$ -	
200 EQUIPMENT				
204 Office Machines	$ -	$ -	$ -	
206 Fire Radio	-	-	-	
210 Miscellaneous	100.00	100.00	100.00	
211 Law Books & Supplements	-	-	-	
Total Equipment	$ 100.00	$ 100.00	$ 100.00	
300 SUPPLIES & MATERIALS				
313 Office Supplies & Printing	$ 200.00	$ 300.00	$ 300.00	
320 Materials (Training Program)	-	-	-	
Total Supplies & Materials	$ 200.00	$ 300.00	$ 300.00	
400 OTHER EXPENSES				
403 Telephone, Electric, Etc.	$ 100.00	$ 100.00	$ 100.00	
404 Travel	400.00	500.00	500.00	
406 Repairs to Equipment	50.00	100.00	100.00	
410 Miscellaneous	150.00	250.00	250.00	
411 Postage	-	-	-	
* Fire Training Site 1966	-	50,000.00	-	
Total Other Expenses	$ 700.00	$ 50,950.00	$ 950.00	
TOTAL FIRE BUREAU - FIRE ADVISORY BOARD	$ 1,000.00	$ 51,350.00	$ 1,350.00	

* $25,000 ear-marked 1964 - See Account 290-560

class action

that pltf is a member of a class to wit ~~ne~~ negro residents of the Village of Nyack and that ~~all of~~ there are common questions of law and fact applicable to pltf indiv'lly and to all members of the class and that the class is too numerous to bring before this Court; that pltfs can adequately the members of the class

from issuing, advertising, offering for sale, selling, distributing or in any way disposing of said bonds, ~~and~~ further from receiving ~~any thin~~ money or anything of value, from the issuance sale or distribution of said ~~monies~~ unless and until a fair and equitable plan of desegregation of said Village Fire department has been filed with and ~~appropriate~~ approved by this Court, and further that this Court pursuant to ~~powers~~ the authority held by it retain jurisdiction and custody over this matter and the parties hereto until ~~such~~ it

~~time~~ is demonstrated that defendant has carried out by all appropriate steps the desegregation of the said Village fire dep't and ended discrimination in said dep't and fr such other further & different

COrtlandt 7-6270
James Farmer
national director

NYACK

Carl,

The order was filed July 29. The appeal must be taken before August 29. Mr. Mandel is vacationing, but will return Monday the 22nd,

Bill

Page #4

	BUDGET 1964-1965	1965-1966
FIRE DEPARTMENT		
Sec. Bd. Fire Comm.	$ 400.00	400.00
Janitors 1	1,380.00	1,380.00
Mechanics 1	540.00	720.00
Supt.Fire Alarm 2	800.00	800.00
Labor & Serv. Fire Al.	350.00	400.00
Mechanic Auto Repairs	600.00	600.00
TOTAL	4,070.00	4,300.00
EQUIPMENT		
Major (Truck & Apparatus)	-0-	-0-
Minor (Hose, Boots, Hats,etc	6,000.00	6,700.00
Major Repairs Equip.1	1,500.00	2,000.00
TOTAL	7,500.00	8,700.00
OTHER EXPENSES		
Light & Gas 1	1,700.00	1,700.00
Fuel Oil 1	1,200.00	1,200.00
Telephone 1	300.00	300.00
Insurance 1	1,500.00	1,500.00
Gas & Oil 1	400.00	400.00
Repairs & Maint.Bldg. Equipment	750.00	750.00
Other Supplies & Exp.	750.00	750.00
Rent 120.00 Monthly -	1,440.00	1,440.00
Supplies Fire Alarm 2	500.00	500.00
Repairs & Maint.Alarm 2	350.00	350.00
Power Fire Alarm 2	250.00	100.00
Fire Protection U.Grandvw.	700.00	700.00
Paint Ladders	-0-	-0-
Fire Police	100.00	100.00
Radio Repairs & Maint.		400.00
TOTAL	9,940.00	10,190.00
GRAND TOTAL	$21,510.00	$23,190.00

SS SEDFRE

FIRST NATIONAL CITY BANK, NY VS. CRAYTON, FRANCES, 1967

Box 36
Folder 27

State Historical Society of Wisconsin

Please Retain Original Order

f-7

Number of Note: **15M 1576 053**

Date of Note: **July 11, 1966**

STATEMENT

Face Amount of Note	$ 1128.00
Installments Paid	$ 376.00
	$ 752.00
Unearned Discount	$ 26.04
	$ 725.96
Fines	$ 21.15
Matured Balance	$ 747.11
Payments After Maturity	$ None
Unpaid Balance	$ 747.11
Attorney's Fees	$ 112.07
Due Plaintiff	$ 859.18

SEP 4 1967

DEFENDANT

Name: Frances Crayton
Date of Birth: 5/18/43
Res.: 718 E. 9th St., Apt. 5, N. Y., N. Y.
Employer:
Bus. Add.:

VERIFICATION

STATE OF NEW YORK,
COUNTY OF NEW YORK.

DONALD R. LAWRENCE, being duly sworn, says: I am an attorney associated with ANTHONY C. CHRISTY, attorney for the plaintiff herein. The annexed complaint is true to my personal knowledge.

This action is founded upon a written instrument for the payment of money only, now in my possession, which instrument is the source of my information and the grounds for my belief.

DONALD R. LAWRENCE

Sworn to before me this 16th day of August 19 67 af

LORETTA FARRELL
Notary Public, State of New York
No. 03-6239350
Certificate filed in New York County
Qualified in Bronx County
Term Expires March 30, 1968

PMT 709 REV. 4-66

Index No. ...., 19..........

Civil Court of the City of New York
County of New York

FIRST NATIONAL CITY BANK,

Plaintiff,

— *against* —

FRANCES CRAYTON et al.,

Defendants.

Summons and Verified Complaint

Plaintiff by its attorney, Anthony C. Christy, alleges:

I. Plaintiff is a National Banking Association and has its head office and other offices in the City of New York.

II. The defendant(s) transacted business within the City of New York in person or through an agent and the instant cause of action is based upon said transaction of business.

III. Plaintiff is the holder for value of a promissory note executed by the above defendant(s) as (joint and several) maker(s). By the terms of said note the defendant(s) agreed (i) to pay the face amount thereof in equal successive monthly installments together with the fines as therein provided, (ii) in event of default in any of the installment payments, the said note would (at the option of its holder) become due immediately, without demand or notice, and (iii) when referred to an attorney for collection, to pay an attorney's fee of 15% of the balance remaining to be paid on said note together with all costs and expenses attendant upon any action taken or instituted by such attorney.

IV. Defendant(s) failed to make the installment payments as agreed and said note has been matured. The amount paid by the defendant(s), the balance unpaid on said note and the sum due the plaintiff are set forth opposite hereto in a statement which is made a part of this complaint.

WHEREFORE, plaintiff demands judgment against the defendant(s) as stated in the Summons, together with interests, costs and disbursements.

ANTHONY C. CHRISTY
Attorney for Plaintiff
399 Park Avenue
New York, N. Y. 10022

INFORMATION REGARDING THIS ACTION MAY BE OBTAINED BY MAIL OR IN PERSON AT THE ABOVE ADDRESS. PLEASE DO NOT TELEPHONE.

Civil Court of the City of New York
County of New York

FIRST NATIONAL CITY BANK,

Plaintiff,

— *against* —

FRANCES CRAYTON

Defendant(s).

Plaintiff's Address
399 Park Avenue, New York, N. Y. 10022

Summons

To the above named Defendant(s):

You are hereby Summoned to appear in this action in the Civil Court of the City of New York, County of New York, before the Clerk of the said Court at his office at 111 Centre Street, in the County of New York, in the City of New York, within ten days after the service of this summons upon you, exclusive of the day of service, and to make answer to the complaint; or to appear and answer before said Clerk within thirty days after the summons and proof of service thereof are filed with the Clerk if service was made by any other means other than personal delivery to you within the City of New York; upon your failure to answer, judgment will be taken against you for the sum of Eight Hundred Fifty Nine and 18/100 Dollars ($ 859.18), with interest thereon (on $ 747.11) from the 11th day of August , 19 67 , together with the costs of this action.

Dated, New York City, the 16th day of August , 19 67.

ANTHONY C. CHRISTY
Attorney for Plaintiff
399 Park Avenue
New York, N. Y. 10022
Telephone: 559-3791

(See verified complaint on back hereof.)

NOTICE

The original summons and complaint in this action was duly filed in the office of the Clerk of this Court on..
and was assigned Index Number....................................

PMT 709 REV. 4-66

ANTHONY C. CHRISTY
COUNSELOR-AT-LAW
399 PARK AVENUE
NEW YORK, N. Y. 10022

TELEPHONE 559-3791

PLEASE REFER TO FILE NO.
PL# 15M 1576 053

September 5, 1967

Carl Rachlin, Esq.
150 Nassau Street
New York, New York 10038

RE: FIRST NATIONAL CITY BANK
VS: FRANCES CRAYTON

Dear Sir:

In accordance with our understanding, enclosed herewith is a stipulation in the above matter. Please sign the stipulation, returning the original and one copy to me in the enclosed business reply envelope.

Enclosed is a payment book which your client may use in making payments at any Branch of the Bank.

Very truly yours,

DBK:mcn
Enc.

CIVIL COURT OF THE **CITY** OF NEW YORK
COUNTY OF NEW YORK

FIRST NATIONAL CITY BANK

Plaintiff

-against-

FRANCES CRAYTON

Defendant(s)

Index No. 149395 - 1967

STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between ANTHONY C. CHRISTY, attorney for the plaintiff, and **Carl Rachlin, attorney for the defendant, Frances Crayton**, as follows:

1. **The defendant, Frances Crayton, will interpose no answer in this action.**

2. The defendant(s), **Frances Crayton**, will pay to the plaintiff the sum of $ 747.11, together with interest on $ 747.11, from **August 11, 1967**, ~~statutory costs based on the amount sued for~~ and all legal disbursements incurred herein as follows: **$30.00 monthly commencing September 20, 1967**

   until the total amount as herein stated has been fully paid.

3. The plaintiff will not enter judgment in this action against the defendant(s), **Frances Crayton**, so long as the payments are made as herein agreed, but upon any default occurring **and not being cured within 10 days after written notice to the attorney for the defendant, Frances Crayton; thereupon without further notice,** the plaintiff may then enter judgment against the defendant(s) for the amount demanded in the summons and complaint. However, execution shall issue only for the amount then due and owing.

4. If and when the amount stated herein has been fully paid in accordance with the terms hereof, the attorney for the plaintiff and **the attorney for the defendant, Frances Crayton,** will sign a further stipulation marking the action settled and discontinued.

Dated: New York, N.Y.
September 5, 1967
PL#15M 1576 053
mcn

Attorney for Plaintiff

Carl Rachlin

Attorney for Defendant

PMT 11 REV.5-67

Dear Carl [1967]
I would like
to give the Bank
$50.00 now, $100.00
on Sept 8th & $50.00
on Sept. 22nd. I
should be up to
date by then &
I'll continue
to make regular
monthly payments

2.

As per our original
agreement.
You can call
me at 993-7434

Thanks
Love
Fran

ROBERT B. FRANK
COUNSELOR-AT-LAW
399 PARK AVENUE
NEW YORK, N. Y. 10022

TELEPHONE 559-3481

PLEASE REFER TO FILE NO.
PL# 15M 1576 053

March 1, 1968

Miss Frances Crayton
1341 Shakespeare Avenue
Bronx, New York 10452

RE: FIRST NATIONAL CITY BANK
VS: FRANCES CRAYTON

Dear Miss Crayton:

I have your letter of February 19th referring to the arrears on your arrangement. I have noted your file that a remittance of $30.00 is presently in transit, however, this will still leave the arrangement in arrears for the month of February.

Please let me know when to expect the remainder of the arrears, so that I may note your file.

Very truly yours,

Robert B Frank

CWS/mld
Copy to: Carl Rachlin, Esq.
150 Nassau Street
New York, New York 10038

ANTHONY C. CHRISTY
COUNSELOR-AT-LAW
399 PARK AVENUE
NEW YORK, N. Y. 10022

TELEPHONE 559-3791

[N.O.]

PLEASE REFER TO FILE NO.

Frances Crayton
715 E. 9th Street
New York City, New York

RE: FIRST NATIONAL CITY BANK
VS: FRANCES CRAYTON

Date	P.L. Number	Terms of Arrangement	Last Payment Made	Amount of Arrears
11/24/7/ds	15M 1576 053	$30.00 monthly	9/25/7	$60.00

Pursuant to the arrangement made with you for the payment of the balance due upon the above account, I had expected to receive promptly the indicated payments. No payment has been received since the date indicated above.

Unless the entire amount of arrears is paid promptly, and future payments made punctually, as arranged, I shall **enter judgment against you.**

Very truly yours,

Anthony C. Christy
ANTHONY C. CHRISTY

Copy to:

Carl Rachlin Esq.
150 Nassau St.
New York, NY
10038

(For your convenience in replying, use reverse side.)

PMT 736 REV. 1-66

Frances Crayton

~~Warning~~
~~building~~

7 mos. in arrears
hold judgment

waive atty

was paying $47.00

~~will~~ to pay $30.00

515 - 3787
Doris Keeley
1st National

---

settled as follows with
Miss Keeley

1 Beginning 9/8 to
pay $30 per mo

2 pay to waive atty
fees

3 - will not enter
judgment unless she defaults

MSS 546 S EDFRE

FLORES, JOSE, A. VS. NEW YORK 1968
(DISTURBING THE PEACE)

Box 36
Folder 28

State Historical Society Of Wisconsin

Please Retain Original Order

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE A. FLORES, EDGARDO BARRERA, and
ESTEBAN FIGUEROA,

Defendants

AFFIDAVIT

State of New York) SS.:
County of New York)

CARL RACHLIN, ESQ., BEING DULY SWORN, DEPOSES AND SAYS:

1. I am an attorney admitted to practice law in the State of New York and submit this affidavit in support of the request of defendants for an adjournment of this case until November 27, 1968, so that volunteer counsel can adequately prepare for trial.

2. I am the Legal Director of the Scholarship, Education, and Defense Fund for Racial Equality. We are involved in civil rights and poverty law cases throughout the nation.

3. I was requested to secure volunteer counsel for the trial of the above case by one of the defendants, Mr. Jose A. Flores.

4. I am pleased to advise the Court that George Karp, Esq., is willing to represent the above defendants as volunteer counsel, but that he is actually engaged on November 19, 1968, and requests an adjournment to November 27, 1968, to allow time for interviewing the defendants and conducting necessary research.

WHEREFORE, I respectfully request that the above captioned case be adjourned until November 27, 1968, so that Mr. Karp can prepare an

CR

CARL RACHLIN, ESQ.
Office and P.O. Address
164 Madison Avenue
New York, New York 10016

Tel. No. 212-532-8216

Sworn to before me this

15th day of November, 1968.

Richard McKlee

Notary Public

Form 260-200M-615213-(67) 346

NOTICE OF APPEARANCE
TO CLERK

Criminal Court of the City of New York

Part 3, **County of** BRONX

THE PEOPLE OF THE STATE OF NEW YORK
ON THE COMPLAINT OF

vs.

JOSE A. FLORES, EDGARDO BARRERA,
and ESTEBAN FIGUEROA

TO THE CLERK.

SIR:

You are hereby notified that I have been retained by the defendant

or by ______ of ______
Name of Person *Address*

in the above entitled action.

Dated NOVEMBER 19 *19*68

CARL RACHLIN, ESQ.
Attorney for Defendant (Print Name)

Address 164 MADISON AVENUE
NEW YORK, NEW YORK 10016

By Andres Flores Jr
(Sign)

Telephone No. 212-532-8216

J Joe Flores.

~~PL 8 – 8180~~
PL 8 - 2600

(1) Date –

(2) 170 S Jerome arrested – Section IIa criminal.

1) Jose A Flores – 1305 Nelson apt 4G

2) Edgardo Barrera   Edgardo BArrera

3) Esteban Figueroa –   Esteban Figueroa

(3) Possible witnesses – No witnesses.

(4) Charge – Misconduct, disturbing the Peace. Use of ~~profane~~ obscene language

(5) 1 cop pressed charges. 3 present – (by [illegible]

the cop that pressed charges was not the one used foul language

(6). ~~This~~ 3 Appeared twice already.

– Case have been moved to a later date – by us.

7 – Name of attorney. Patricia Ames – ~~8~~ AL-5-7800. – i. Manhattan

originally – Perkell – HA 5-1790 – He was very busy & asked us to get in contact w/ Pat Ames.

8) We have pleaded not guilty – because ~~you~~ we were charged with misconduct & we had never did it. – one of us [illegible] edgar – With disturbing the peace. – we were not disturbing – the peace – (We have never been arrested, & are married men) –

~~5000~~

Joe Flores

Nov 18 72

JOE FLORES
665-3308

3 people -

members of Young Puerto

DATE OF ARREST

SEPT. 22ND

put signs up in

ALL 3 ARRAIGNED

told they had permit

170th + JEROME

by Chavez.

Congressman [illegible] theirs.

remor

PART ~~[illegible]~~ 3
MONDAY
BRONX Crt

Signs 8" x 4"

Wall of subway stat began to put up one sign

— party on wall - cop grabbed it as soon as taken off wall

— Cop attempted to rip folded in ½

— ~~Cop tried to rip~~

Cop ripped sign when still in boy's hands

— sign ripped as cop pulling it away

— ESTHBAN FIGUEROA

- then they argued for 5 minutes
- then civilian cop came
  showed badge
-

- language w - BARRERA

- taken to station
- arrested all 3 people JOE FLORES did nothing
- dis con
- disturb peace
- obscene lang

⇒ PATRICIA AMES
AL5-7800
- defense counsel for United Farmworkers

⇔

933-6638 ESTEBAN FIGUEROA
Parents home - brother & sister

⟷

- SECTION 3 -

Ethan Elden 588-6790
CR spoke w/ Dick Brown
suggested we call you
Grape Strike

MISS LEVY AT 588-6790

⊖ What were you doing?

Put up signs in the subway - in the
train - cop said not too put on subway wall,
& ~~cop said~~ not started to rip up sign. Sticker
8×4 inches ⇔ cop took it off then
we folded in halfs. - & cop tried to rip it
Never grabbed the entire sign off the bags hard.
Bez Estebon Figueroa

use of language Edgardo Bonaceros.
- after that he took us to the station - all three - we sat
on the floor - called two patrolmen - ~~who~~ they were taken in patrol car.
- Joe got the summons - Joseph Flore.
Discon, disturbing the peace, Obscene language - charges:
Patrolman - _ —

what they took off - not return.

S SEDFRE

Florida v. John Wesley Bryant - case
1967

Box 36
Folder 25

State Historical Society of Wisconsin

Please Retain Original Order

Waller -

[May 18, 1967

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

Ct. Cr. 16,743

STATE OF FLORIDA :

VS :

JOHN WESLEY BRYANT; :
LEMUEL GREEN; :
CRAWFORD LOUIS JONES; : GRAND LARCENY
JOSEPH WALLER, JR.; :
JOSEPH WALL; TOMMY :
WILLIAMS :

MOTION FOR NEW TRIAL

COMES NOW the defendant, JOSEPH WALLER, by and through his undersigned attorney and files this his Motion for New Trial and as grounds therefore shows;

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the evidence.

3. That the verdict is contrary to the weight of the evidence.

4. That the Court erred in failing to direct a verdict at the close of the State's case and at the close of the defense case.

5. That the Court erred in failing to define and explain all of the elements constituting Grand Larceny.

6. That the Court erred by granting in part the State's requested instruction No. 1.

7. That the court erred in failing to give the instruction requested by defendant Joseph Wall, and adopted by Joseph Waller, said instruction No. 1, 2, and 3.

8. That the Court erred in failing to give defendant Joe Waller's requested instruction No. 1, 2, 4, 5, 6, 7, and 8.

9. That the Court erred in denial of the Defendant's motion to Quosh.

10. That the Court erred in denial of Defendant's motion for a direct verdict.

11. That the Court erred in denial of Defendant's motion for a continuance.

12. That the Court erred in excessively interrupting Counsel for the Defendant in his examination and cross-examination of witnesses.

13. That the Court erred in limiting Counsel for the defendant in his direct examination of witnesses Talmadge Rutledge and Dr. Clark Bouman.

Frank Peterman
2510 9th Street South
St. Petersburg, Florida

John D. Due, Jr.
Attorney for the Defendant
540½ West Brevard Street
Tallahassee, Florida

By: John D Due Jr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for New Trial has been furnished to the Office of the HONORABLE CLAIR A. DAVIS, State Attorney, Court House, Clearwater, Florida, by personnal service this 18 day of May, 1967.

John D Duelfo

Please make a file for Jo. Waller Fla.

To: Carl Rachlin
From: John Due
Re: Joe WAller case

[March 24, 1967]

This memorandum results from my second interview in confidence in St. Petersburg, Florida on March 23, 1967.

Background information regarding this case is contained in the memorandum copy of which has been sent to you.

Professor Leslie Levinson, consents to be attorney of record regarding the appeals and other matters which are not involving trial. His address is 1701 Southwest 16th XXXX Street, Gainesville, Florida. Mr. Levinson is a former LCDC attorney and now is professor of law at the University of Florida. I have prepared a retainer form for him and I have also filed notices of appearance for myself. Mr. Levinson will not be present at any motions prior to or involving the trial.

The Judge involved ~~in the Joe W[illegible] cse is~~ in the Municipal Joe Waller Case is Judge Esteva. Joe Waller is, as shown in the first memorandum, was charged in the municipal court with city offenses and is charged with misdemeanors for the civil and criminal court of record and of course he is charged with a felony in the circuit court. Proper description of the charges in the municipal court, you already have. A proper description of the civil and criminal court of record and the small claims court is as follows:

Either Judge Rolbert E. Freeze (senior judge) Clearwater 446-7X161, St. Petersburg 898-6941 or Sials E. Daniels Clearwater, 446-7161. Other officials in the above said court, county prosecutor: Allan R. Williams, St. Petersburg 391-0234, clerk of circuit court , Harold Mullendore, Clearwater, 446t7161. The deputy clerk is
Sheriff is Don Genung, Clearwater, 584-2141, Pinallas County Courthouse, Clearwater. Sixth Judicial Circuit Court, Judges are C. Richard Evangood, St. Petersburg, Allan C. Anderson, St. Petersburg, C.M. Kissinger, St. Petersburg, who is the presiding judge, 898-X4161 , Jmaes Tl Smith, St. Petersburg, Victor O. Whele, St. Petersburg Ben F. Overton, St. Petersburg, B.J. Driver, Clearwater, Joseph P McNulty, Clearwater, Charles M. Phillips, Clearwater Richard Kelly, Dade City, Orville L . Dayton.

The Presiding judge and the judge who has been corresponding with us is Joseph R. McNulty. The judge in that particular circuit where we have a possible friend, in that I represent his brother in Quincy, is Judghe Richard Kelly. Other officials are state attorney, Clair A. Davis, Clearwater, 446-7061 The Particular atssistant state attorney who has been corresponding with us, with whom we have contact is Mr. . The other official in this

18 case is public defender , Robert E. Jaeger, Clearwater. H

He is representing the defendants

The defendant's wife is Ruth Waller, 2450 Harrington Avenue South. St. Petersburg.

I viewed the State's files of the felony cases and all

the information and will not dictate notes , but I do have my original notes. I shall therefore set forth only the pertinant information. Attorney E.M. Davis on January 20, 1967 , filed an motion to reduce the bond of Tommy Williams and Crawford Jones. This indicates that he therefore represents two of the defendants and the records seems to show that Mr. Jaeger represented Lemuel Greene, Joseph Waller and Joseph Walls , because on or about January 20, 1967, Jaeger filed affidavits of insolvency pursuant to section 924.17 on behalf of these persons. There was an order entered on behalf of Lemuel Greene and Joseph Wall. There was also a motion for a list of witnesses, motion for inspection, etc. pursuant to Florida Statutes 906.29, 925.05. We are filing similar motions. Joseph Waller signed his affidavit of insolvency and an order was entered on February 3, 1967 I believe that we should file a motian for insolvency and an order relating to services of a court reporter and all other expenses which we might need.

It is very interesting to note that Jaeger has kept filing motions for a seperate trial on behalf of Joseph Walls and Lemule Greene from the other. These motions have been denied, but he keeps filing them. He also filed a motion to withdraw as counsel in representing Joseph Waller, indicating that there would be 1. a conflict in the defense, 2. a conflict in the interests between the parties.

On February 15, 1967, Attorney Davis also filed a motion to sever the trial, the grounds were that the sentence proposed is contrary and conflicts with all other parties and interests of the defendant and that neither of the above defendants who he represents are involved in the consipiracy or actural taking of the property. Again, keepint in mind that Davis represents Tpl Williams and Drawford Jones. The other defendant, John W. Bryant seems to be represented by Frank Peterman. As you recall, this is the person who Joe Waller did not want to represent him. On the 23 of February, a motion for discovery and production of documents were granted. On February 23, 1967, the court granted a motion for a bill of particulars on behalf of Lemuel Greene and Joseph Wall (not Waller) require the state of Florida to allege the specific kinds of offenses they are prosecuted under 811.28 821 and all the other particulars were denied. Also on that same date, he allowed a motion to withdraw as coulsel and which was granted, then a letter was sent to me on March 1, 1967, indicating whether or not I rpresent Joe Waller. On March 8, 1967, a bill of particulars was ~~fixed~~ pursuant to the order was filed by Clair Davis. On March 10, a motion for seperate trials was filed and on March 14, this motion was denied.

Interview with Joseph Waller

Joseph Waller seems to be quite undernourished and skinney He informs me that three meals are furnished by the city only when the prisoner works on a detail. Waller indicate that in his manner of resistance, he of course will not be on detail. He said that the food which he eats and which the other Negro prisoners eat is always cold and unappetizing because they are the last ones to eat. The city of St. Petersburg, and New South City feeding the white prisoners first. I am writing a letter to the city police chief and to the city judge and jailer indicating that my client Joe Waller seems to be quite undernourished and sickly. I would appreciate very much that he be examined by a doctot free of charge. Also If this cannot be arranged, that permission oto Dr. O.T. Ayer to examine Joe Waller. I would appreciate a response to this request as soon as possible.

In as much as the circuit court is not allowing seperate trials, it appears that in the state case on April 25, 1967, we will have three attorneys , one attorney being Mr. Peterman, Mr. Davis and Mr.Jaeger and Myself. I wish to know your advise as to whether or not there is anything I can do in order to demand a seperate trial or would this be wise? As soon as we have our motion for sueing in forma pauperis, we better file a motion for withess subpoena of all witnesses to make sure that they do not disappear on A½ril 25. I understand that one of the witnesse which you would like to see is reporter now for the Lakeland Ledger. ~~Don Starr.~~ (this is not Don Starr).

JOSEPH WALLER CASE

March 24, 1967

Here is a bill of particulars which was filed by Mr. Clair Davis, state attorney for the sixth judicial circuit of Florida in response to the request for the bill of particulars filed by Robert Jaeger, Public Defender for Joseph Waller. It states:

In answer to the defendants motion for a bill of particulars, the foregoing defendants took from the possession of the true owner with intent to deprive or defraud the true owner of his property or his use and benefit thereof, and to appropriate the same to the use of the taker or another person.

On March 10, 1967, Jaeger filed the following:

Comes now the defendant, by and through his undersigned attorney and files this his motion for a seperate trial in the above styled cause for the following grounds.

1. The defendant has been advised and informed on such advice the information alleges that two of the co-defendants physically removed the alleged painting in the city hall of the city of St. Petersburg, Pinallas County, Florida.

2. The defendants Joseph Waller has been fruther adivsed and informed and upon said advice and information alleges that one or more of the co-defendants have made statements that could be used against him and prejudice the defendant.

3. That the defendant Joseph Waller has been further advised and infromed and upon said advice and information allegesa that one or more of the c0-defendants made statements prior to the alleged incidents which might be prejudicial to the defendant.

4. That all the foregoing testimony and evidence which prejudice and/or the defendant would be faced with the duplicate burden of having to meet the prosecution of evidence and also the evidence of his co-defendants; the defense of the defendant, Joseph Waller requests this honorable court to grant him a seperate trial in the above entitled cause.

Filed on behalf of Lemuel Greene

Docket No. 8 Case no. 7494, Joseph Waller

resisting arrest without violence

Joseph Waller did obstruct and oppose Sgt. Les Hofner of St. Petersburg police department while in lawful execution of his duty which consisted of arresting Joseph Waller for malicious destruction of property contrary to Section 843.02, Fla. Sta. Plea was not guilty 2/27/67 , Case set for May 8, 1967

This is an information filed by Mr. L.R. Williams, prosecuting attorney on 2/13/67, The capias was issued on 2/14/67 and executed on /2/15/67, Don Genung , sheriff, detective Homer Allen, Judge Estevera, case 87640.

Alleges destruction of property, the other witness is Thomas Witham, 7221 Bartlett Avenue, Dennis Quilligan, state attorney's office, Hoffman, police department

Bond set at $250/00

SEDFRE FORD, LOUIS et al VS. BOEGER, WILLIAM et al, 1963-1963
(JEFFERSON BANK AND TRUST CASE)

Box 36
Folder 30

State Historical Society of Wisconsin

Please Retain Original Order

IN THE SUPREME COURT OF THE STATE OF MISSOURI

In the Matter of:

LOUIS FORD, IAN GRAND, BENJAMIN GOINS, ROBERTA TOURNOUR, TAYLOR JONES, KENNETH LEE and RONALD GLENN,
Petitioners

Versus

MARTIN L. TOZER, Sheriff of the City of St. Louis, Mo.
and
WILLIAM BOEGER, Warden of City Jail
Respondents

No. ____________

APPLICATION FOR WRIT OF HABEAS CORPUS

Your petitioners, LOUIS FORD, IAN GRAND, BENJAMIN GOINS, ROBERTA TOURNOUR, TAYLOR JONES, KENNETH LEE, and RONALD GLENN, by their attorneys, respectfully represent that they are unlawfully restrained of their liberty by MARTIN L. TOZER, Sheriff of the City of St. Louis; and WILLIAM BOEGER, Warden of the City Jail of the City of St. Louis, pursuant to Judgments and Order of Commitments, of the Honorable Michael J. Scott, Judge, Division #2, St. Louis Circuit Court, rendered in Cause No. 57945-E, on the twenty-fifth day of October, 1963; that said imprisonment, detention and confinement are illegal in the following respects, to wit:

I

The Court lacked jurisdiction to try these Petitioners, for criminal contempt for the following reasons, to wit:

1. The violation of any of the court's restraining order by these alleged contemnors was a civil and not a criminal contempt. These proceedings were instituted and conducted, not by or in the name of the State as an independent action for an affront to the dignity of the court, but by the plaintiff below

as an auxiliary proceeding to its main suit to protect its property from continuing trespasses and to save itself from irreparable injury. It was based upon Plaintiff's Motion for issuance of attachment for contempt and plaintiff's counsel presented the evidence in the contempt proceedings. (See Ex. P-6).

2. No notice was ever served on these petitioners that would give them notice that they were being tried for criminal contempt.

3. There was no Application for Issuance of a Citation for Contempt and none was issued which charged these petitioners with any offense whatsoever.

4. The Motion for the Issuance of Attachment (Ex. P-6) and the Attachment Order (Ex. P-7) recited only the manner in which the Restraining Order had been violated, but did not inform the Petitioners of any contempt charge, either civil or criminal, against them, either individually or collectively, thereby denying to them due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 10 and 18a of the Constitution of the State of Missouri and thus conferred no jurisdiction upon the Court.

II

The Court lacked jurisdiction to render the particular Judgments of Contempt against these petitioners who are not named defendants nor members of the class in that:

1. The Application for Injunction (Ex. P-3) and the Temporary Restraining Order (Ex. P-4) as issued by the Court purport to bind only certain named defendants and others who are members of the Class, and Petitioners herein are not named

defendants or members of the class, therefore the Judgments of Contempt against these Petitioners are void as a matter of Law.

2. The Bond (Ex. P-5)does not purport to indemnify any persons except the named defendants in the Petition for Injunction and restraining order, hence the judgments of contempt against these Petitioners are void as a matter of Law.

3. The Court cannot enlarge the Indemnity Agreement which is in the nature of a Third Party Beneficiary contract between the bonding company and plaintiff bank to include persons not contracted for by them solely for the purpose of thrusting jurisdiction upon the Court, and the judgments of contempt are therefore void as a matter of Law.

III

The entire proceedings and trial constitute a denial to these petitioners of due process and equal protection of the laws as guaranteed to them by the Constitution of the United States and the 14th Amendment thereof, the 6th and 8th Amendments thereof and the Constitution of the State of Missouri, Article 1, Sections 10 and 18a. The said violations have been, among others, as follows:

1. The petitioners Ford, Grand, Goins, Tournour, Jones, Lee and Glenn were arrested about 5:00 p.m. on Friday, October 4, 1963 and were held by the St. Louis police without an opportunity to make bail or consult with counsel until the plaintiff bank could obtain attachments from the court which were then served upon petitioners about 8:00 p.m. that Friday evening.

2. Immediately thereafter petitioners were brought to Court and a hearing was held on the attachment over the objections of defense counsel.

3. The Attachment did not contain any notice of the charges against the petitioners.

4. At 8:00 P.M. or thereabouts, Friday, October 4, 1963, a hearing was held on said attachments over the objections of defense counsel and petitioners were forced to a hearing with no opportunity to make any preparation or defense or prepare evidence to disprove the charges.

5. At the conclusion of the hearing on the attachment, about 2:30 A.M., Saturday, October 5, 1963, the Court read a statement (Ex. P-8) wherein the Court found that Petitioners had not disproved the contempt and ordered petitioners to show cause on Monday, October 7, 1963, at 10:00 A.M. why they should not be punished for contempt.

6. The court proceeded to trial on Monday, October 7, 1963, without giving petitioners a reasonable opportunity to prepare a defense in that petitioners had no opportunity to file interrogatories, take depositions or obtain witnesses in their behalf, and received in evidence all testimony adduced at the hearing on the attachment.

7. Each petitioner was not advised of the nature of the proceedings against them, nor the specific acts which constituted an alleged contempt.

8. The application for citation, the attachment issued thereon and the trial procedures were for civil contempt and petitioners were punished for criminal contempt.

9. After trial the court imposed excessive fines of $500.00 and jail sentences from 60 days to one year.

10. After trial the court found petitioners guilty of criminal contempt and denied the bail pending a motion for re-hearing or pending appeal and denied them the right to appeal.

3. The Attachment did not contain any notice of the charges against the petitioners.

4. At 8:00 P.M. or thereabouts, Friday, October 4, 1963, a hearing was held on said attachments over the objections of defense counsel and petitioners were forced to a hearing with no opportunity to make any preparation or defense or prepare evidence to disprove the charges.

5. At the conclusion of the hearing on the attachment, about 2:30 A.M., Saturday, October 5, 1963, the Court read a statement (Ex. P-8) wherein the Court found that Petitioners had not disproved the contempt and ordered petitioners to show cause on Monday, October 7, 1963, at 10:00 A.M. why they should not be punished for contempt.

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7. Each petitioner was not advised of the nature of the proceedings against them, nor the specific acts which constituted an alleged contempt.

8. The application for citation, the attachment issued thereon and the trial procedures were for civil contempt and petitioners were punished for criminal contempt.

9. After trial the court imposed excessive fines of $500.00 and jail sentences from 60 days to one year.

10. After trial the court found petitioners guilty of criminal contempt and denied the bail pending a motion for re-hearing or pending appeal and denied them the right to appeal.

IV

The Trial Court lacked jurisdiction to issue its Restraining Order in that, to wit:

1. A labor dispute existed within the meaning and interpretation of the applicable Federal Statutes and decisions relating to labor relations. (Ex. P-1, P-2)

2. The Federal Government has pre-empted the field of labor disputes.

3. This case does not come within any of the exceptions to this rule which would confer jurisdiction upon the state courts.

4. The state court is without authority to enforce the racial discriminatory policy of any person or persons or of any private or public agency.

V

The Court exceeded its jurisdiction in rendering the particular judgments in that the fines and sentences are excessive and therefore constitute cruel and unusual punishment contrary to the 8th Amendment to the United States Constitution and Article 1, Section 21, of the Missouri Constitution.

VI

The Court exceeded its jurisdiction to try these petitioners for an alleged criminal contempt by its failure to follow procedures set forth in Supreme Court Rule 35.01, in that:

1. No notice was issued prior to the hearing on the attachment.

2. The statement by the court at the conclusion of the hearing on the attachment does not constitute notice within the meaning of Supreme Court Rule 35.01 in that it did not state the essential facts constituting the alleged criminal contempt and did not describe it as such and did not allow a reasonable

time for preparation of the defense.

3. No application for criminal contempt was made by the prosecuting attorney or an attorney appointed by the court for that purpose.

VII

The Court lacked jurisdiction to render the particular judgments committing these defendants to jail and assessing the fines against them in that, to wit:

1. The Findings of Fact and Judgments (Ex. P-9a to g) for each defendant is a mere statement of conclusions by the Court and hence is insufficient as a matter of law to support the judgment of the Court based thereon, as being contrary to the statutes and decisions of the law of Missouri.

2. The Commitment Order for each Petitioner (Ex. P-10a to g) is a mere statement of conclusions by the Court and hence insufficient as a matter of law to support the order of imprisonment by the Court based thereon being contrary to R.S. Mo. 1959 476.140 and Decisions of law of Missouri.

3. The Commitment Order of each Petitioner is a variance to the Findings of Fact and Judgment by the Court in that the Commitment Orders purport to commit to jail for an offense different in substance from the offense for which each petitioner was allegedly charged and found guilty, and therefore is voic as a matter of law to support the imprisonment based thereon.

VIII

Petitioners state that Sections 476.110 and 526.220, R.S. Mo. 1959, and Supreme Court Rule 35.01, under which the contempt proceedings were initiated against them are unconstitutional and void, and by reason thereof the judgments and orders of commitment are void, in that:

1. Said statutes and rule are so vague, indefinite, and ambiguous that a person charged under them cannot determine what the nature of the charge is against him, what the proper procedure should be or what his rights are thereunder.

2. Said statutes and rule are so vague, indefinite and ambiguous that the state courts' application of them and the decisions as to proper procedure or meaning thereunder are in conflict.

3. Said statutes and rule, even if they are deemed to be constitutional, are unconstitutional as they have been applied to these petitioners in this instance, in that their rights to know the nature of the charge against them and to due process and equal protection of the law under Articles VI and XIV of the Constitution of the United States and Article I, Sections 10 and 18a of the Constitution of the State of Missouri, have been denied.

IX

Petitioners further state that no application for this particular relief sought has been made to or refused by any court, officer or officers superior to the one to whom this petition is presented.

WHEREFORE, your Petitioners pray that a Writ of Habeas Corpus issue as to each of the Alleged Contemnors, that they be discharged from their unlawful imprisonment, or that the Alleged Contemnors be admitted to bail pending a hearing of this proceeding on its merits and the Discharge of these defendants.

Louis Ford

Ian Grand

Benjamin Goins

Roberta Tournour

Taylor Jones

Kenneth Lee

Ronald Glenn

Petitioners

Clyde Cahill

Charles B. Oldham

Joseph S. McDuffie

ATTORNEYS FOR PETITIONERS

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

The affiants, Louis Ford, Ian Grand, Benjamin Goins, Roberta Tournour, Taylor Jones, Kenneth Lee, and Ronald Glenn, petitioners in the above and foregoing application for Writ of Habeas Corpus make oath and say that the facts and allegations stated in the above and foregoing application are true according to their best knowledge, information and belief.

____
Louis Ford

____
Ian Grand

____
Benjamin Goins

____
Roberta Tournour

____
Taylor Jones

____
Kenneth Lee

____
Ronald Glenn

Subscribed and sworn to before me this ________ day of ________________________, 19______.

____
Notary Public within and for
the City of St. Louis, State
of Missouri.

My Commission expires __________________________.

IN THE ST. LOUIS COURT OF APPEALS
OF THE
STATE OF MISSOURI

In the Matter of:

LOUIS FORD, IAN GRAND, BENJAMIN GOINS, ROBERTA TOURNOUR, TAYLOR JONES, KENNETH LEE and RONALD GLENN

Petitioners,

VERSUS

MARTIN L. TOZER, Sheriff of the City of St. Louis, and WILLIAM BOEGER, Warden of the Municipal Jail, City of St. Louis,

Respondents

No. 31778

JOINT MEMORANDUM ON BEHALF OF PETITIONERS LOUIS FORD, IAN GRAND, BENJAMIN GOINS, ROBERTA TOURNOUR, TAYLOR JONES, KENNETH LEE and RONALD GLENN

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INDEX

PAGE

Table of Cases A

Statement of Facts 1

Points & Authorities 4

I. Labor Dispute exists 7

II. Petitioners not served with restraining order and are not parties to the suit 7

III. Petitioners never notified of charges 8

IV. Petitioners not given time to prepare a defense 8

V. Lack of Due Process under 14th Amendment 8

VI. Contempt, if any, is Civil not Criminal 9

VII. Attachment was insufficient to give notice of charges 11

VIII. The Court lacked jurisdiction to render Particular Decision and Judgments 11

IX. Findings of Fact and Judgments are insufficient as a matter of law 12

X. The Injunction Bond is defective 13

XI. Sentences and Fines are excessive 19

TABLE OF CASES

Berder v. Young 252 SW 691

City of St. Louis v. St. Louis Gas Light Co 82 Mo. 352

Ex parte Dillon 96, SW 2d 1095

Ex parte Fuller 50 SW 2d 654

Ex parte Mason 16 Mo. App. 41

Garner v. Teamsters 346 U.S. 485, 74 S. Ct. 161

Glenn v. Hendrix 349 SW 2d 532

Gompers v. Bucks Stove and Range Co., 221 U.S. 418,
- 31 Sup. Ct. 492

Graybar Electric Co. v. Automotive Petroleum Workers, etc.
287 SW 2d 794

Huegel v. Langston 228 SW 2d 833

Kenealy v. Staed, 55 Mo. App. 176

McNealey v. Rouse, 264 SW 2d 383

Merchants Stock & Grain v. Chicago Board of Trade
187 F. 398, 109 CCA 230

New Negro Alliance v. Sanitary Grocery Co. 303 U.S. 552
58 S. Ct. 703

Odom v. Langston 213 SW 2d 948

LAWS

Labor Management Relations Act 29 U.S.C.A., Sec. 7, et seq.

Rev. Statutes of Mo. 1959, Sec. 476.140

Rev. Statutes of Mo. 1959, Sec. 526.070

Supreme Court Rule 35.01

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI

In the Matter of:

LOUIS FORD, IAN GRAND, BENJAMIN GOINS, ROBERTA TOURNOUR, TAYLOR JONES, KENNETH LEE AND RONALD GLENN,

Petitioners

VERSUS

MARTIN L. TOZER, Sheriff of the City of St. Louis, and WILLIAM BOEGER Warden of the Municipal Jail, City of St. Louis,

Respondents

No. 31778

JOINT MEMORANDUM ON BEHALF OF PETITIONERS LOUIS FORD, IAN GRAND, BENJAMIN GOINS, ROBERTA TOURNOUR, TAYLOR JONES, KENNETH LEE and RONALD GLENN

STATEMENT OF FACTS

This is a proceeding in Habeas Corpus by Benjamin Goins, Kenneth Lee, Ronald Glenn, Taylor Jones, Louis Ford, Roberta Tournour and Ian Grand. Petitioners Kenneth Lee and Ronald Glenn are minors. Attorney Joseph McDuffie has been appointed as the guardian for the two minors.

On October 25, 1963, the Honorable Michael J. Scott, Judge of the Circuit Court of the City of St. Louis found the petitioners guilty of contempt of court and imposed sentences ranging from 60 days to one year in the Municipal Jail and assessed fines of Five Hundred Dollars ($500.00) and one seventh of the cost of court on each case.

The convictions have arisen out of a suit for injunction filed by the Jefferson Bank and Trust Company, a corporation against Robert B. Curtis and others individually and as representatives of the St. Louis Committee of Racial Equality, see Exhibit P-3. The suit was filed August 29, 1963 and sought temporary relief by way of a restraining order. On Friday, August 30, 1963 a restraining order was issued against all defendants individually and as representatives of a class known as St. Louis Committee of Racial Equality, see Exhibit P-5.

The background of the controversy centers around a request by St. Louis CORE to the Jefferson Bank and Trust Company to hire four Negroes in clerical or tellers positions at its bank. The Jefferson Bank and Trust Company refused to hire the Negroes. See Exhibits P-1 and P-2.

The petitioners herein were not parties to the suit for injunction filed on August 29, 1963 and were not members of St. Louis CORE and not named in the restraining order and they have not been made parties to said suit or named in the restraining order.

On Friday, October 4, 1963 the petitioners herein went to the Jefferson Bank and Trust Company and entered said bank carrying signs pinned or fastened to them reading "4 JOBS". Inside the bank they sang freedom songs, locked arms, sat and stood in front of the entrances to said bank. While petitioners were inside said bank an official of the bank read to them a copy of the restraining order dated August 30, 1963. The petitioners had not prior to that time been served with a copy of the restraining order. After said order was read by the official of the bank, a request was made to petitioners to leave the bank. The petitioners refused to leave the bank. There were on hand police officials who promptly arrested petitioners and placed them in custody, removed them bodily from the bank to the police headquarters. They were all charged with peace disturbances and with trespassing. The arrests and placing petitioners in custody took place between 4:00 p.m. and 6:00 p.m. on Friday, October 4, 1963.

While the petitioners were at the police headquarters being processed, requests were made by some of them to see or call friends or relatives or to confer with counsel. These requests were denied.

About 8:00 p.m. Friday, October 4, 1963 while the petitioners were still in custody of the police authorities, they were served by the Sheriff of the City of St. Louis with writs of Attachment in words and figures as follows: See Exhibit P-39

STATE OF MISSOURI) SS
CITY OF ST. LOUIS)

THE STATE OF MISSOURI,
To Martin L. Tozer, Sheriff of the City of St. Louis, Missouri, GREETING:'
We command that you do forthwith, without excuse or delay, bring, or cause to be brought, before the Honorable Circuit Court of the City of St. Louis, and in Division No. 2 thereof,

the bodies of any and all persons who shall with knowledge of temporary restraining order heretofore issued in this proceeding shall violate said restraining order by standing in, lying in, sitting in, singing in or walking in the Jefferson Bank and Trust Company ______________________

____

____

____

____

____

____

____

BY WHATEVER NAMES OR additions they are known or called, then and there to have them before the Court in Cause No. 57945-E wherein Jefferson Bank and Trust Company, a corporation, is plaintiff, and Robert B. Curtis, William L. Clay, Charles R. Oldham and Marian Oldham, Lucien Richards, Richard Daly, Walter Hays, Rev. Charles Perkins, Norman Seay, Herman Thompson and Melvin West are defendants, and have with you this writ return indorsed thereon, and herein fail not at your peril.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis. This   day of   , 1963.

PHELIM O'TOOLE
Clerk, Circuit Court
By: ______________________
Deputy

The petitioners were then taken that same night by the Sheriff of the City of St. Louis to the Civil Courts Building and to Division No. 2 thereof and over objections were placed on trial and three witnesses testified against them. This took place prior to any service of citation or other pleadings with charges in them were served on petitioners. In the early hours of Saturday morning, October 5, 1963, the petitioners were given a copy of Exhibit P-4 and ordered to trial on Monday, October 7, 1963.

On Monday, October 7, 1963, objections were made and request for continuances were made urging that counsel had not had adequate time to prepare the defense; that they did not have copies of the charges against their clients, and that some of the Attorneys were not yet present in Court. See Vol. 1, Second & Seven (tr   )

Special objections were urged to the effect that the petitioners did not know the nature of the charges against them, since no citations had been served upon them. Attorney Wayne L. Millsap then stated in open Court that the petitioners were being tried for Civil Contempt. No special prosecutor or attorney was appointed by the Court in the case of these seven petitioners.

The Court overruled all objections and the cause proceeded to trial. The evidence heard on Friday night and Saturday morning on October 4th and 5th was used as part of the evidence against petitioners. The petitioners were found guilty and were sentenced and fined. See Exhibits P-43 (A-G) After the Court below found petitioners guilty and sentenced them to definite terms in the City Jail and fined them and assessed costs against them, petitioners moved the Court below for a stay of execution or for bail pending a re-hearing or pending review. The Court denied the motions and committed the petitioners to the custody of the respondent herein.

These petitioners have brough Habeas Corpus to test the legality of their restrain, imprisonment, fines and convictions. They challenge the entire proceedings in the lower Court. Some of the points or errors or challenges are as follows:

POINTS AND AUTHORITIES

I

The Circuit Court was without jurisdiction to issue the restraining order of August 30, 1963 because there was a labor dispute within the meaning of the National Labor Relations Act and amendments thereto.

Labor Management Relations Act and amendments thereto 29 USCA Sec. 7, et seq.

New Negro Alliance vs. Sanitray Grocery Co., 303 US 552, 58 S. Ct. 703.

Volume 31, American Jurisprudence, p. 832, Sec. 558. Note 5

Garner v. Teamsters, 346 U.S. 485, ;74 S. Ct. 161.

Graybar Electric Co. v. Automotive Petroleum Workers, etc., 287 SW 2d 794.

II

These petitioners were not served with the restraining order nor the order to show cause and were not parties to the injunction suit.

III

No pleading or process, or notice containing the charges were ever served on these petitioners, thereby denying them due process and equal protection of the laws.

Mo. Constitution, Article I, Sections 10, 18a, 19 and 21

14th Amendment Constitution of the United States

170 CJS 78, paragraph 62

Supreme Court Rule 35.01

Langston v. Odom, 213 SW 2nd 948

IV

The petitioners were denied due process and equal protection, were not given the right to counsel, or adequate time to prepare defenses.

Missouri Constitution, Article I, Sec. 10, 18a, 21

Amendments 6, 8th and 14th to the Constitution of the United States.

V

That in the Court's findings herein above referred to and which were served your petitioners in open court at 2:30 a.m. on October 5, 1963, petitioners were ordered to show cause on Monday, October 7, 1963, why they should not be punished for contempt; that they were forded to trial on Monday, October 7, 1963, over objection of defense counsel, without adequate time to prepare their defense which was a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

VI

THE CONTEMPT, IF ANY, IS CIVIL AND NOT CRIMINAL

Gompers, et al vs. Buck Stove & Range Co. 221 U.S. 418, 31 Sup. Ct. 492

Huegel vs. Kimber, 228 S.W. 2d 833

McNealey vs. Rouse 264 S.W. 2d 383

Odom vs. Langston 213 S.W. 2dk 948

State ex. rel. Chicago B & Q R.R. Co. vs. Bland 189 Mo. 197 88 S.W. 28

Worden vs. Searls 121 U.S. 14, 7 Sup. Ct. 814

Parker vs. U.S. 153 Fed. 2d 66

Merchants Stock & Grain vs. Chicago Board of Trade 187 Fed. 398, 109 C.C.A. 230

Bender vs. Young, 252 S.W. 691

VII

THE WRIT OF ATTACHMENT WAS INSUFFICIENT TO GIVE NOTICE OF CHARGE

Rule 35.01 Mo. Supreme Court

See ex parte Mason 16 Mo. App. 41

VIII

THE COURT LACKED JURISDICTION TO RENDER THE PARTICULAR DECISION AND JUDGMENTS

Buck Stove & Rouse Co. vs. Gompers, 221 U.S. 418, 31 Sup. Ct. 492

Huegel vs. Kimer, 228 S.W. 2d 833

Odom vs. Langston, 213 S.W. 2d 948

IX

THE FINDINGS OF FACTS AND JUDGMENTS AND COMMITMENT ORDERS ARE SUFFICIENT AS A MATTER OF LA

Sec. 476.140 R.S. Mo. 1959, Sup. Court Rule 35.01 (Mo.)

Ex parte Fuller 50 S.W. 2d 654

Odom vs. Langston, 213 S.W. 2d 948

Glenn vs. Hendrix 349 S.W. 2d 532

Sands vs. Richardson, 252 S.W. 2d 990

X

THE INJUNCTION BONDS IS DEFECTIVE AND INSUFFICIENT AS TO THESE PETITIONERS, AND DEPRIVES THE COURT OF JURISDICTION, AND RENDERS THE RESTRAINING ORDER VOID

See Sec. 526.070 R.S. Mo. 1959

Ex parte Dillon 96 S.W. 2d 1095

Kinealy vs. Staed 55 Mo. App. 176

State ex rel Thrash vs. Lamb, 237 Mo. 437, 141 S.W. 665

City of St. Louis vs. Saint Louis Gas Light Co. 82 Mo. 352

State ex rel Williams vs. Mo. Pac. R.R. et al, 120 S.W. 751

221 Mo. 266

State ex rel American Bankers Association vs. McQuillian 26 Mo.

164, 168 S.W. 924

Vol. 43 C.J.S. Sec. 166, page 780-784 - Sub. Sec. Bl

State ex rel George vs. Mitchell, 230 S.W. 2d 116

XI

THE SENTENCES FINES AND JUDGMENTS ARE EXCESSIVE, CRUEL AND INHUMAN AND THE COURT EXCEEDED ITS JURISDICTION

See Article I, Section 8, 9, 10, 18a, & 21 of Missouri

Constitution and Amendments one, five, six, eight, and

fourteen of U.S. Court I

ARGUMENTS

Point I

The judgment, decision and sentences of the court are assailed because the court lacked jurisdiction of the subject matter of the controversy. The subject matter was one of jobs for Negroes, and as such, a labor dispute existed within the meaning of the National Labor Relations Act and various amendments thereto.

See section 7 National Labor Relations Acts. See New Negro Alliance vs. Sanitary Grocery Company 303 U.S. 552, October term 1937. See volume 31 American jurisprudence, page 832, section 558 note 5, wherein the following statement is made namely:

> "Strong support is given to the view that picketing for purpose of forcing an employer to hire colored people is within the anti-injunction provision of the Norris-LaGuardia Act and similar legislation." Citing 303 U.S. 552.

See Garner vs. Teamsters, Chauffeurs, etc., 346 U.S. 485. 74 Supreme Court 161, where the U.S. Supreme Court said:

> "The grievance was not subject to litigation in tribunal of the state."

In arriving at such ultimate conclusion, the Court held that Congress had pre-empted the field and vested jurisdiction in the National Labor Relations Board saying:

> "Congress has taken in hand this particular type of controversy where it affects interstate commerce."

The Garner vs. Teamster case doctrine of pre-emption by Congress in labor dispute cases has been cited with approval by the Appellate Courts of Missouri. This was expressly decided in Graybar Electric Company vs. Automotive, Petroleum, etc., 287 S.W. 2d. 794, 365 Mo. 753.

Before State Courts can issue injunctions in Labor Disputes there must be certain specific findings of facts in advance. No such finding was made in the case at Bar.

Point II

There are two restraining orders in the court file and neither of these restraining orders was ever served on any of the Petitioners nor was there any evidence that any of these Petitioners had knowledge of the contents of either of said restraining orders. Hence none of these Petitioners can be guilty of any contempt.

Point III

That there was no service of the application for a contempt citation on any of the petitioners; the attachment order issued pursuant to the application for contempt citation contained no specific charge against any of these petitioners, either individually or collectively, and hence they had no knowledge of either why they were being attached or what they were charged with, thereby denying them of due process of law under the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 10, 18a, 19, and 21 of the Constitution of the State of Missouri and thus conferred no jurisdiction upon the Court.

Point IV

That these Petitioners were arrested at or about 5:30 p.m. October 4, 1963, by the Police of the City of St. Louis, Missouri; that they were denied the right to counsel while in the custody of the police, and at about 8:00 p.m., and while still in custody of the police, and at about 8:00 p.m., and while still in custody, they were served with the attachment order heretofore referred to and brought before the Honorable Michael J. Scott, Judge of the Circuit Court of the City of St. Louis, at which time, prior to the acquiring any knowledge of the charges against them and without the right to confer with counsel, testimony was adduced from witnesses for plaintiff and a finding made by the court as to the petitioners' guilt; and they were remanded to thecustody of the Sheriff upon failure to give excessive bail as set forth in the Findings of the court, all in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10, 18a, and 21 of the Constitution of the State of Missouri.

Point V

That in the Court's findings herein above referred to and which were served your petitioners in open court at 2:[illegible] a.m. on October 5, 1963, petitioners were ordered to show cause on Monday, October 7, 1963, why they should not be punished for contempt; that they were forced to trial on Monday, October 7, 1963, over objection of defense counsel, without adequate time to prepare their defense which was a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

Point VI

That this court action was instituted by the plaintiff to preserve a private right for its benefit and that the purpose of the Court's Contempt Citation was to assure obedience to its restraining order which had been made for plaintiff's benefit; that proceedings for the violation of said restraining order instituted by plaintiff are, if anything, civil contempt, that counsel for plaintiff stated in open court on Monday, October 7, 1963, that he was proceeding as for civil contempt against petitioners; (The Court did not appoint Special Prosecutor). The Court was without jurisdiction to charge and try the defendants with criminal contempt.

The Court below imposed on petitioners sentences in the City Jail from 60 days to 270 days andfines from $500.00 to $1000.00. These sentences indicate that the Court below was treating the actions of the petitioners as criminal contempt.

a. A close examination of the law and facts on the face of the proceedings will reveal that the Court below was in error, and that the contempt, if any, was civil and not criminal.

The petition for injunction was filed by the Jefferson Bank and Trust Company for the purpose of enjoining the defendants therein from doing certain acts as disclosed by the prayer of the petition, as follows: (see exhibit - page 3)

WHEREFORE, plaintiff prays as follows:

> "That this Court issue its restraining order, restraining and enjoining the defendants and each of them and all persons acting by, through or under them, and every other person or persons acting under the direction or instruction or in concert with them from:

> Physically hindering, obstructing, interfering with, delaying, molesting or harassing other persons desiring to enter plaintiff's banking premises, from entering said premises for the purpose of conducting their business with plaintiff or for any other purpose.
>
> Congregating or loitering individually or in groups inside plaintiff's banking premises and therein engaging in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees in the performaces of their duties or other persons in the conduct of their business with plaintiff or which in any way interferes with the proper and normal conduct of plaintiff's banking business.
>
> Physically hindering, obstructing, interfering with intimidating or in any other manner preventing customers of plaintiff and other members of the public from having the usual and customary access to tellers' windows located in plaintiff's banking premises or access to any other department or portion of said banking premises wherein plaintiff conducts its banking business."

Thus, it clearly seen that the purpose of the injunction suit was to protect a private right, the business of the bank, the funds on deposit and the property of the bank from the trespass, damages and injury by the defendants therein, the petitioners herein.

b. The Temporary Restraining Order issued pursuant to the petition is captioned the same way the petition for injunction was styled. (see exhibit - Page 5) And the whole tenor of it is designed to protect the private business and property of the Jefferson Bank and Trust Company.

c. The Application for Attachment is styled the same as the original cause, with the same parties, the same cause number, the same Court division. (See Exhibit P-7) The application is by the Jefferson Bank and Trust Company. In the First, Third, Seventh, Eighth and Twelfth paragraphs of the application and in the prayer will be found references to the plaintiff's private business. In paragraph 12 of the application for citation the purpose is made clear in the following language:

> " That the acts of the herein named defendants above referred to further constitute a violation of the rights of the plaintiff herein in that said acts constitute a trespass of plaintiff's property, a complete disruption of plaintiff's business, and the said misconduct of the herin named defendants is calculated to and is intended to and does in fact defeat the rights and remedies of your petitioner as a plaintiff in the above entitled action and is causing actual loss and injury to this petitioner".

> In the prayer of the application the bank asks [illegible] "its costs and expenses herein and in its behalf, including attorney's fees to be allowed by the Court, and why the Court should not make such other orders and give such other relief as may be just and proper in the premises".

Part of the oath to the Application for Citation or the verification is made in the following language:

> "Wayne L. Millsap, being duly sworn on his oath did say that he is the attorney for the Jefferson Bank and Trust Company, a Corporation".

Thus, it is clear that the purpose of the Application for Citation for Contempt was for the enforcement of the Temporary Restraining Order designed to protect the private rights of the Jefferson Bank and Trust Company. Nothing is said in the Application for Citation about the majesty of the Court.

Point VII

The attachment order issued against the Petitioners was defective in that:

a) It did not recite or contain a specific charge against these alleged contemnors, either individually or collectively, and hence did not give them notice of what they were being attached for, hereby denying them due process of law under the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 10, 18a, 19 and 21 of the Constitution of the State of Missouri and thus conferred no jurisdiction upon the Court.

See Petitioners' Exhibit (The Attachment Order)

Point VIII

That the trial court lacked the jurisdiction to render the particular judgment in this cause, and to make its findings of fact and judgment because such Findings of Fact are completely at variance with procedure which was instituted and the evidence and are insufficient in law to give the Court jurisdiction to make the particular judgments found herein by the trial court.

See Finding of Fact and Judgment for seven contemnors, Exhibits P- through P-

See Commitment Order for seven contemnors, Exhibits P- through P- .

Point IX

That the Findings of Fact and Judgment and the Commitment Order are mere statements of conclusions, are insufficient as a matter of law to support the judgment of the Court which are based thereon, and therefore the court did not have jurisdiction to render the particular judgments.

See Findings of Fact and Judgment for seven contemnors, Exhibits P- through P-

See Commitment Orders for seven contemnors, Exhibits P- through P-

All seven statements of Fact and Judgments are identical except for the names of alleged contemnors.

Page 1, Paragraph 1

1. "this cause" - what cause? By whom prosecuted?
2. "on verified motion" - Verified by shom? and on whose behalf?
3. "and after hearing" - what hearing and about what? against whom? for whom? what time?
4. "and hearing thereupon commenced" - what time? what for? Against whom? for whom?
5. who was present?
6. "Committed to City Jail - by what authority?
7. "Ordered to Show Cause" - How? What Notice of what charges were given or served on him?

Page 1, Paragraph 2

1. "trial commenced" - trial for what?

Page 3, Paragraph 2

1. "Temporary Restraining Order read to defendant" - by whom? Where? And at what time?

Page 3, Paragraph 3

1. What facts show "acting in concert, participation with, aiding and abetting "one or more defendants named in the original case?

Page 3, Paragraph 4

1. Which Entrance did defendant stand, sit and lie in front of? How did he harass?
2. What did defendant do to interfere with, hinder and annoy persons in the conduct of their business with the bank? What persons?

Page 4, Paragraph 3

1. who "read" restraining order? When?
2. "Interfere with proper and normal conduct"? How

Point X

That the Indemnity Bond filed by plaintiff, Jefferson Bank and Trust Company, with its Application for Injunction and Restraining Order is insufficient on its face to cover these petitioners, in that the bond does not name Louis Ford, Ian Grand, Benjamin Goin, Roberta Tournour, Taylor Jones, Kenneth Lee and Ronald Glenn individually nor does it name a class to which they belong, and it was required to be executed only to certain named defendants not including these petitioners. Therefore the Court lacked jurisdiction.

T Judge failed to sign the bond. There is nothing on the face of the bond to show the approval by the Court. There is nothing on the document signed by the Judge that relates to the injunction bond, and there is nothing on the injunction bond which relates to the document signed by the Judge. There are alterations and deletions on the face of the bond which tends to make it operative, defective and void.

The bond does not meet the requirements of the temporary restraining order, and does not cover petitioner Raymond Howard, and does not cover the named defendants as representatives of the Saint Louis Committee of Racial Equality, and does not comply with the statute and has alterations and deletions in it. The bond is fatally defective and void.

The Missouri Statute requiring a bond in injunction cases goes back to 1835. The bond is jurisdictional in all such cases, except those which are specifically exempted by the statute. The case of the Jefferson Bank and Trust Cpmpany, a corp., vs. Robert B. Curtis et al, does not come within those cases except by the statute.

As early as 1893, the Saint Louis Court of Appeals ruled in the case of Michael Kimealy vs. Patrick M. Staed, Sheriff, reported in 55 Mo. Appeals 176, dealing with an injunction bond. In the Kimealy case a party by the name of Macklin, his wife, and a party by the name of Haydel as trustee for such wife, recovered judgment in the Supreme Courts of Missouri. An injunction was issued, and bond was ordered to be posted. Additional provisions were inserted in the bond to cover individuals who were not parties to the suit. The court held in the case as follows:

> The ordinary injunction bond wouldhave furnished no security to any person not a party to the proceeding, not interested in the subject matter or the controversy"

In the case of the State ex. rel. Thrash et al., vs. Lamb 237 Mo 437, 141 S.W. 665, the prosecuting attorney brought suit on behalf of the State of Missouri to enjoin the sale of intoxicants in violation of certain local laws. Although this case came within the exceptions provided in the statute, the Missouri Supreme Court said as follows:

> "We have hereto decided that a Court acts in excess of its jurisdiction when it issues a preliminary injunction, without bond, in a case where such bonds is required".

In the caseof the City of Saint Louis vs. Saint Louis Gas Light Company, reported in 82 Mo. 353, the reason behind the requirements for a bond in preliminary injunction cases is discussed. In that discussion the Missouri Supreme Court said the following:

> "The matter in issue involves a question of equity practice and jurisdiction as affected by our statutes relating to such questions. For a proper understanding of the issue, it will be necessary to allude to the jurisdiction and practice of Courts of equity in respect to damages consequent upon the dissolution of injunctions as it existed prior to and independent of statutes. When temporary injunctions were granted, as they frequently were, upon the naked petition and ex parte showing of applicant, and were afterwards dissolved in a final hearing of the case, neither law nor equity furnished any remedy to the defendant for the damagesconsequent from them, however serious they might be. Such damages were considered as flowing from the judgment and orders of the Court, and not from the plaintiff, if he did

> nothing more than sue in good faith for process awarded him. The injunction which so often resulted from haste and unfounded orders of injunctions, for the consequences of which the Court alone were responsible under law, induced them to adopt, as far as was in their power such measures and safe guards as might afford the defendants an indemnity against loss and injury from injunctions which ought never to have been granted"----"This provision which has been in force since 1835 is very plain in its terms. It assumes to control the discretion of the Court in respect to safeguards for the indemnity of the defendant, and prescribes a particular one in the nature of a bond which they must not fail to exact before issuing the order of injunction".

In this case of State ex. rel. Williams vs. Mo. Pac. R. R. Co., and others, 120 S.W. 75, the Circuit Attorney of Saint Louis filed suit to enjoin certain Railroads from enforcing and collecting certain rates. The lower Court granted a temporary restraining order without requiring an indemnity bond. The railroads sought prohibition, challenging the jurisdiction of the Court on the ground that the statutory injunction bond had not been posted. The Circuit Attorney's position was that his office came within the exception provided by the statutes. The Supreme Court disagreed with that position, and held that the restraining order was not effective because the necessary injunction bond had not been posted. The Court adopted the reasons set forth in the case of the City of Saint Louis vs. the Saint Louis Gas Light Company.

In the case of State ex rel AmericanBanker Association vs. McQuillian, reported at 260 Mo. 164, 168 S.W. 924, the Circuit Judge issued a temporary injunction without bond. On a writ of prohibition, the Court held that the Circuit Judge had acted in excess of his jurisdiction and in express contravention of the Statute, and that his acts were properly subject to prohibition. The Court ruled in the following language:

> "The right to grant a temporary or preliminary injunction is forbidden by Statute until a sufficient bond is executed to the other party".

The Court then cited with approval the case of State ex rel Williams vs. Mo. Pacific R. R. Co., and others 221 mo. 266, 120 S.W. 751. In the State ex rel Williams vs. Mo. Pacific R.R. Co., and others, the Court used the following language:

> "In view of the reason of the Statute exacting bond as a condition precedent to the granting of an injunction, we are of the opinion that the requirement of it goes to the very jurisdiction of the Court, and that an injunction under the Statute, without requiring the bond and its execution and approval before the issuing of the injunction, is and would be in excess of the jurisdiction of the Circuit Court".

The case of ex parte Dillon, 96 S.W. 2d 1095, decided by the Kansas City Court of Appeals is one of the leading cases in this State dealing with the sufficiency and coverage of the injunction bond under the Missouri Statutes.

This Dillon case involved Habeas Corpus Proceedings on behalf of Mr. & Mrs. Harry C. Dillon. They had been found guilty and were sentenced to imprisonment in the County Jail for a definite period.

The facts briefly stated are that one Hitchcock and wife filed suit against Gow, trustee, Empire Trust Company, and Le Roy Mead, trustee in bankruptcy for the H. S. Smith Investment Company to determine the title to 45 acres of land. The Empire Trust Company filed a cross petition seeking affirmative relief, and asking for the appointment of a receiver, and for a restraining order against plaintiffs.

The lower Court appointed Ewing as receiver and issued a restraining order against plaintiffs isn the case and decreeing that the plaintiff in said action:

> "And any and all persons claiming under them as tenants, lessees or successors in interest be restrained and enjoined from holding possession of said premises from said receiver and the Empire Trust Company pending the final disposition of the cause and requiring the Empire Trust Company to post a $300.00 bond to be executed to plaintiffs securing and indemnifying the plaintiffs up to $300.00."

Held - where receiver was appointed for property - which was subject of litigation - defective injunction bond which failed to indemnify persons other than parties to litigation held to invalidate injunction - and other parties could not be held in contempt for violation of injunction.

The Court held that a proper injunction bond complying with requirements of Statute is pre-requisite to issuance of an injunction.

> "The bond required of the Empire Trust Company as preliminary to the issuance of the injunction (as appears from the order granting the injunction) was not in accordance with the requirements of Section 1507 R.S. Mo. 1929 - P. 1663). It was required to be executed only to the plaintiffs in the action in which it was given and required to indemnify only such parties against damages. It was not required to be executed to person interested in the subject matter of the litigation who were not parties to the action. Neither was it required to indemnify such person against damages and injury".
>
> "The petitioners were not parties to the action, but they were interested in the subject matter thereof. So far as these petitioners are concerned, the bond required does not protect or indemnify them. A proper injunction bond, complying with the requirement of the Statute, is a prerequisite to the issuance of the injunction. Without it, there is no jurisdiction to issue the injunction. From the record herein, it does not appear that any such was required or given, at least so far as petitioners are concerned. The injunction as to petitioners cannot be enforced".

It is clear that the injunction bond in the present case does not cover petitioner Raymond Howard, neither does it cover the defendants named therein as a class. It does not meet the Statutory requirements and is void for all purposes.

The court lacked jurisdiction to issue the restraining order for want of a proper injunction bond.

Section 526.070 Mo. Statutes, 1959 provides as follows:

> "No injunction, unless on final hearing or judgment, shall issue in any case, except in suits instituted by the state in its own behalf, until the plaintiff, or some responsible person for him, shall have executed a bond with sufficient surety or sureties to the other party, in such sum as to the courts or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction to the parties enjoined or to any party interested in the subject matter or the controversy conditioned, that the plaintiff will abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved"

Let us inspect and observe in detail the bond as posted in the instant case. The restraining order in its outset states as follows:

> "Temporary restraining order ordered to issue as to all defendants individually and as representatives of a class known as Saint Louis Committee of Racial Equality"

The injunction bond as posted by the plaintiff in the case at bar, omitting the captions, reads as follows:

INJUNCTION BOND

"Known all men by these presents that we, Jefferson Bank and Trust Company, as principal, and Hanover Insurance Company, as surety, are held firmly bound unto Robert B. Curtis, William L. Clay, Charles R. Oldham, Marian Oldham, Lucien Richards Clyde S. Cahill Jr., Richard Daly, Walter Hays, Rev. Charles Perkins, Norman Seay, Herman Thompson and Melvin West in the sum of Ten Thousand and 00/100 Dollars, lawful money of the United States, to the payment of which, well and truly to be made, we bind ourselves, our heirs, legal representatives, and assigns, firmly by the presents.

Thecondition of the above obligation is such that, whereas, upon application of Jefferson Bank and Trust Company, the Circuit Court of the City of St. Louis has granted a temporary injunction against said Robert B. Curtis, William L. Clay, Charles R. Oldham, Marian Oldham, Lucien Richards, ~~Clyde S. Cahill, Jr.~~, Richard Daly, Wlater Hays, Rev. Charles Perkins, Norman Seay, Herman Thompson and Melvin West, as by the record of said court will fully appear: Now, therefore, if the said Jefferson Bank and Trust Company shall abide the decision which shall be made in the cause wherein said injunction was granted, and pay all sums of money, damages and cost that shall be adjudged against them if the said injunction shall be dissolved, then this obligation shall be void, otherwise to remain in full force.

WITNESS our hands this 29th day of August, 1963

Jefferson Bank and Trust Company

By Joseph H. McConnell
Exec. Vice Pres.

Hanover Insurance Company

By J. D. Hambet

Approved in open court this ________ day of ___________ 1963.

Judge, Circuit Court
City of St. Louis

It is apparent at the outset that the bond as posted on its face does not cover petitioner Raymond Howard.

It is also apparent that the bond does not cover the named defendants therein "individually and as representatives of a class known as Saint Louis Committee of Racial Equality" as ordered in the restraining order.

The caption of the case names the defendants individually and as representatives of a class known as Saint Louis Committee of Racial Equality.

The allegations in paragraph three (3) and four (4) of the plaintiff's petition for injunction names defendants as "officers, members or representatives of the Saint Louis Committee of Racial Equality."

The statute requires that the bond shall idemnify "all damages that may be occasioned by such injunction to the parties enjoined or to any party interested in the subject matter of the controversy." These above quoted provisions of the statute are not included in the bond as posted.

Point XI

That based upon the evidence in this case all of the fines and sentences for a definite period of time are too severe, too harsh, too excessive; they are punitive rather than coercive, are cruel and inhuman and in violation of Amendments One, Five, Six, Eight and Fourteen of the United States Constitution and Article One, Sections 8, 9, 10, 18a, and 21 of the Constitution of the State of Missouri.

Attorney for Petitioners

Memorandum served upon Wayne L. Millsap, attorney for Jefferson Bank by mailing a copy of same to his office 509 Olive this 20th day of November, 1963.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LOUIS FORD, et al,)
)
Petitioners,)
) No. 64-C-53 (2)
vs.)
) HABEAS CORPUS
WILLIAM BOEGER,)
)
Respondent.)

MOTION TO SET ASIDE ORDER OF COURT REQUIRING PETITIONERS AND RESPONDENT TO FILE ALL EXHIBITS, ENTIRE RECORD AND COMPLETE TRANSCRIPT OF PROCEEDINGS IN CIRCUIT COURT, CITY OF ST. LOUIS

Come now the petitioners and respectfully move the Court to set aside its order of March 13, 1964, ordering and requiring:

> "that attorneys for petitioners file with the Court the transcript of the proceedings before the Circuit Court of the City of St. Louis, State of Missouri; that the attorneys for respondent file with the Court the exhibits introduced in the trial court; that petitioners further file with the Court a certified copy of all records made by the Court in the Circuit Court of the City of St. Louis, including minute entries, returns and other pertinent information;"

and as reason therefore allege and state as follows:

1. That petitioners have requested an evidentiary hearing to produce evidence to supplement records of the Circuit Court of the City of St. Louis on the issues of; (a) nature and extent of the labor dispute between petitioners and the Jefferson Bank and Trust Company, (b) the interest, bias, and prejudice of the attorney for Jefferson Bank and Trust Company, and (c) the discriminatory hiring practices of the Jefferson Bank and Trust Company.

2. That plaintiff's exhibits B-1 through B-6, B-40, B-41, B-42, and B-43 are inadmissable and prejudicial to petitioners on the

issues joined in the pleadings and all of said exhibits and alleged contemnors' (petitioners herein) exhibits 1 and 2 are immaterial and irrelevant to the issues on which petitioners have requested an evidentiary hearing.

3. That substantial portions of the record of the Circuit Court of the City of St. Louis are immaterial and irrelevant to the issues on which petitioners have requested an evidentiary hearing and only that portion of the record which is required to determine the right of petitioners to an evidentiary hearing should be filed with this Court.

4. That the transcript of the trial in the Circuit Court of the City of St. Louis contains evidence which is inadmissable and prejudicial to the petitioners on the issues joined in the pleadings and further that substantial portions of the transcript are immaterial and irrelevant to the issue on which petitioners have requested an evidentiary hearing.

5. That the action of the Court in ordering and requiring petitioners and respondent to file with the Court all exhibits, the entire record and the complete transcript, whether relevant or material to the issues involved, is an effort on the part of the Court to assimilate its task to that of a Court of Appellate Review, that the order requiring the filing of said exhibits, transcript and record prior to any hearing and which contain evidence relating to all the issues joined in the pleadings is improper procedure and prejudicial to petitioners because they will not be afforded an opportunity to object to evidence and exhibits and matters contained in the record which were improperly admitted or are immaterial and petitioners cannot properly prepare a record for purposes of appeal, all of which constitutes a denial of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, petitioners request the Court to set aside and hold for naught its order of March 13, 1964, and to enter a new order requiring petitioners and respondent to file with this Court that portion of the record and transcript which are admissable, relevant and material on the issue of whether petitioners are entitled to an evidentiary hearing to produce evidence to supplement the records of the Circuit Court of the City of St. Louis on the three issues set forth in paragraph one (1) of this motion.

Robert Wilson, Jr.
Attorney for Petitioners
4332a Easton Avenue
St. Louis, Missouri
Telephone OLive 2-3284

Of Counsel:

Wyvetter H. Younge
Robert Witherspoon
Clyde Cahill
Robert Ratterman
Emanuel Williams

Joseph McDuffie
2847 N. Union Boulevard

Charles R. Oldham
Room 1117 - 722 Chestnut

Copy of the above Motion delivered to Respondent this ______ day of ______________, 1964 by personally delivering same to Respondent's attorney of Record, Eugene Freeman, Assistant City Counselor.

____

CHARLES R. OLDHAM
ATTORNEY AT LAW
722 CHESTNUT - ROOM 1117
ST. LOUIS 1, MISSOURI
CENTRAL 1-0464

MAR 23 1964

March 19, 1964

Mr. Carl Rachlin
% CORE
38 Park Row
New York 38, New York

Dear Carl:

I am enclosing our most recent pleadings. The U. S. Court of Appeals had ordered the habeas applications returned to the District Court for a determination of whether petitioners were entitled to an evidentiary hearing under the Townsend v. Sain doctrine. The Appeals Court also held that under the Fay v. Noia case it was not necessary to go to the Supreme Court of the United States after being turned down by the State Supreme Court and the Burford case was overruled as to the requirement that exhaustion of state remedies also included the dual journey to the Supreme Court of the U. S. A.

The district court is now trying to decide whether or not it will nold an evidentiary hearing - as you can see from our pleadings they have ordered the entire record placed before them and we have objected. First we don't want the entire record before the Judge. Second we want to produce additional evidence and third after he reads and looks at the entire record we will have a hell of a time designating the portion of the record that we need for the purpose of appeal. I cna't help but think of the cost of printing a record of seven volumes, 2,700 pages and 482 exhibits plus hour and a half of silent and sound movies.

See you all at the convention.

Very truly yours,

Charles R. Oldham

Charles R. Oldham

CRO:vm

Encl:

P. S. Our own little legal fund is kinda dry - do you think that I could send a few bills some time in the future. Incidently the NAACP Legal Defense Fund dropped another $1,000.00 in the St. Louis CORE Legal Defense Fund.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LOUIS FORD, et al,)
)
Petitioners,)
) No. 64-C-53 (2)
vs.)
) HABEAS CORPUS
WILLIAM BOEGER,)
)
Respondent.)

MOTION TO SET ASIDE ORDER OF COURT REQUIRING PETITIONERS AND RESPONDENT TO FILE ALL EXHIBITS, ENTIRE RECORD AND COMPLETE TRANSCRIPT OF PROCEEDINGS IN CIRCUIT COURT, CITY OF ST. LOUIS

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and as reason therefore allege and state as follows:

1. That petitioners have requested an evidentiary hearing to produce evidence to supplement records of the Circuit Court of the City of St. Louis on the issues of; (a) nature and extent of the labor dispute between petitioners and the Jefferson Bank and Trust Company, (b) the interest, bias, and prejudice of the attorney for Jefferson Bank and Trust Company, and (c) the discriminatory hiring practices of the Jefferson Bank and Trust Company.

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issues joined in the pleadings and all of said exhibits and alleged contemnors' (petitioners herein) exhibits 1 and 2 are immaterial and irrelevant to the issues on which petitioners have requested an evidentiary hearing.

3. That substantial portions of the record of the Circuit Court of the City of St. Louis are immaterial and irrelevant to the issues on which petitioners have requested an evidentiary hearing and only that portion of the record which is required to determine the right of petitioners to an evidentiary hearing should be filed with this Court.

4. That the transcript of the trial in the Circuit Court of the City of St. Louis contains evidence which is inadmissable and prejudicial to the petitioners on the issues joined in the pleadings and further that substantial portions of the transcript are immaterial and irrelevant to the issue on which petitioners have requested an evidentiary hearing.

5. That the action of the Court in ordering and requiring petitioners and respondent to file with the Court all exhibits, the entire record and the complete transcript, whether relevant or material to the issues involved, is an effort on the part of the Court to assimilate its task to that of a Court of Appellate Review, that the order requiring the filing of said exhibits, transcript and record prior to any hearing and which contain evidence relating to all the issues joined in the pleadings is improper procedure and prejudicial to petitioners because they will not be afforded an opportunity to object to evidence and exhibits and matters contained in the record which were improperly admitted or are immaterial and petitioners cannot properly prepare a record for purposes of appeal, all of which constitutes a denial of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, petitioners request the Court to set aside and hold for naught its order of March 13, 1964, and to enter a new order requiring petitioners and respondent to file with this Court that portion of the record and transcript which are admissable, relevant and material on the issue of whether petitioners are entitled to an evidentiary hearing to produce evidence to supplement the records of the Circuit Court of the City of St. Louis on the three issues set forth in paragraph one (1) of this motion.

Robert Wilson, Jr.
Attorney for Petitioners
4332a Easton Avenue
St. Louis, Missouri
Telephone OLive 2-3284

Of Counsel:

Wyvetter H. Younge
Robert Witherspoon
Clyde Cahill
Robert Ratterman
Emanuel Williams

Joseph McDuffie
2847 N. Union Boulevard

Charles R. Oldham
Room 1117 - 722 Chestnut

Copy of the above Motion delivered to Respondent this ________ day of ______________, 1964 by personally delivering same to Respondent's attorney of Record, Eugene Freeman, Assistant City Counselor.

____

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LOUIS FORD, et al,
Petitioners,
vs.
WILLIAM BOEGER,
Respondent.

No. 64-C-53 (2)
HABEAS CORPUS

NOTICE

TO: Eugene P. Freeman, Office of City Counselor, City Hall, St. Louis, Missouri
John P. Montrey, 818 Olive Street, St. Louis, Missouri
Wayne L. Millsap, 509 Olive Street, St. Louis, Missouri

Please take notice that the undersigned attorneys will call for hearing certain enclosed motions, to set aside Court orders requiring the filing of the entire record of the proceedings in the State Trial Court and appointing John P. Montrey and Wayne L. Millsap as amici curiae and requiring service of papers upon them, on Friday, April 10, 1964 at the hour of ten o'clock A.M. or as soon thereafter as the same may be heard.

Robert Wilson, Jr.
4332a Easton Ave.
St. Louis, Missouri
OL 2-3284

Joseph S. McDuffie
2847 Union Blvd.
St. Louis, Missouri
CO 1 4230

Charles R. Oldham
722 Chestnut
St. Louis, Missouri
CE 1 0464

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LOUIS FORD, et al,	)	
Petitioners	)	
	)	No. 64-C-53 (2)
vs.	)	
WILLIAM BOEGER,	)	
Respondent.	)	

MOTION TO SET ASIDE ORDERS OF COURT APPOINTING WAYNE L. MILLSAP AND JOHN P. MONTREY AS AMICI CURIAE DIRECTING SERVICE OF PAPERS ON SAID AMICI CURIAE AND PERMITTING THEIR PARTICIPATION IN TRIAL

Come now the petitioners and move the Court to set aside its order of February 27, 1964, wherein Wayne L. Millsap and John P. Montrey were appointed as friends of the court, and its orders of March 13, 1964 and March 20, 1964 directing, instructing and ordering petitioners to serve all papers and pleadings on said friends of the court and permitting them to participate fully and completely in pre-trial conferences for the reasons that:

I.

The City Counselor of the City of St. Louis is by law required to represent the respondent, that it is not an undue hardship for the City Counselor to do this because he has had available to him since on or about February 9, 1964, a complete transcript of the trial court record and the evidence and has had and will continue to have ample opportunity to prepare his case so that he can fairly and adequately present all issues of law and fact in the proceedings before this Court.

II.

Wayne L. Millsap and John P. Montrey have a biased, prejudiced and partisan interest in the outcome of this case and can not appear as friends of the court whose mission it is to assist and aid the Court Their appointment is inconsistent with the fairness and impartiality which should clothe an amici curiae, and in support of these allegations petitioners further allege and state:

a. That John P. Montrey and the law firm of which he is a member represent the Bank of St. Louis and his fee for services performed in the State Courts and in the Federal Courts is being paid either by the Jefferson Bank and Trust Company, the Bank of St. Louis or by funds collected for that purpose from various banks in the St. Louis area.

b. That Wayne L. Millsap is the son-in-law of the President of the Jefferson Bank and Trust Company.

c. That Wayne L. Millsap has a financial interest in the Jefferson Bank and Trust Company and a personal and financial interest in the conviction and punishment of the petitioners.

d. That Wayne L. Millsap has repeatedly made derogatory public statement about petitioners referring to them as "animals", calling them irresponsible and pressing for their conviction and punishment thus showing a personal bias and prejudice.

e. That Wayne L. Millsap originally moved this court to be allowed to appear as an additional attorney for the respondent herein as an appropriate officer under Title 28 USCA Section 2252.

f. That Wayne L. Millsap originally sought to appear before this Court and present "arguments in support of the jurisdiction and judgements of said Judge" (Honorable Michael J. Scott, Judge of the Circuit Court of the City of St. Louis).

g. That neither Wayne L. Millsap nor John P. Montrey appeared by appointment of the State Trial Court in the contempt hearings instituted by their client, the Jefferson Bank and Trust Company; and petitioners objected to their thrusting themselves into the proceedings before the St. Louis Court of Appeals and the Supreme Court of Missouri.

h. That Wayne L. Millsap and John P. Montrey in their motion before the U. S. Court of Appeals to appear as friends of the court alleged that they "did appear and were heard in State Court proceedings which denied the release of the petitioners subsequent to a hearing at which time movants appeared in opposition to the issuance of a writ of habeas corpus and the discharge of the petitioners." That by their own motion before the U. S. Court of Appeals they showed their bias, prejudice and interest.

III.

The appointment of Wayne L. Millsap and John P. Montrey as friends of the court with the right to participate fully in all pre-trial conferences, the right to make arrangements to produce evidence, the right to have all papers and documents served upon them and the right to present oral arguments and be heard on pre-trial motions is tantamount to full intervention as a party litigant placing them in the position of interlopers usurping the duties, authority and function of the City Counselor's office.

WHEREFORE, the premises considered, petitioners respectfully move the court:

a. That they be afforded the right to oral argument on this motion together with leave to present evidence.

b. That the court set aside and hold for naught its orders of February 27, 1964, wherein Wayne L. Millsap and John P. Montrey were appointed as amici curiae, and its orders of March 13, 1964 and March 20, 1964, directing, instructing and ordering petitioners to serve all papers and pleadings on said amici curiae and permitting them to participate fully and completely in pre-trial conferences.

Robert Wilson, Jr.
Attorney for Petitioners
4332a Easton Ave.
St. Louis, Missouri

Of Counsel:

Wyvetter H. Younge
Robert Witherspoon
Clyde Cahill
Robert Raterman
Emanuel Williams

Joseph S. McDuffie
2847 N. Union Blvd.

Charles R. Oldham
722 Chestnut - Room 1117

The above motion served upon the Respondent and the amici curiae by mailing true copies thereof to Respondent's attorney of record, Eugene P. Freeman, Office of the City Counselor, City Hall St. Louis, Missouri, and John P. Montrey, 818 Olive Street, St. Louis, Missouri and Wayne L. Millsap, 509 Olive Street, St. Louis, Missouri this ___ day of March 1964.

CHARLES R. OLDHAM
ATTORNEY AT LAW
722 CHESTNUT - ROOM 1117
ST. LOUIS 1, MISSOURI
CENTRAL 1-0464

10 April 1964

Mr. Carl Rachlin
% CORE
38 Park Row
New York 38, New York

Jefferson Bank v. Curtis -
Criminal Contempt

Dear Sir:

Today we are being heard on our motion to remove the bank attorney as amici curiae in this cause. I am enclosing copy of Points and Authorities which we filed.

Very truly yours,
Charles R. Oldham
Charles R. Oldham

CRO/m

encl:

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LOUIS FORD, et al,
Petitioners,
vs.
WILLIAM BOEGER,
Respondent.

No. 64 C 53
Court No. 2

POINTS AND AUTHORITIES

A.

It was an abuse of the Court's discretion to appoint Wayne L. Millsap and John P. Montrey as amici curiae in this cause.

I An amicus curiae, literally "friend of the court" is one not a party who advises or informs the court.

Re: Ohlhauser's Estate, 101 NE 2d 827

3 CJS 2d 1046, Amicus Curiae

4 Am. Jur. 2d 109, Amicus Curiae

II A true amicus curiae is without special interest in the litigation.

Allen v. County School Board of Prince Edward County, DC Va., 28 FRD 358

Kline v. Weaver, 348 SW 2d 379

Burger v. Burger, 293 SW 2d 122

III An attorney for a party ordinarily should not be appointed as amicus curiae.

Universal Oil Products Co. v. Root Refining Co., 1946, 328 US 575, 66 S Ct. 1176, 90 L Ed. 1447

Walker County Lumber Co. v. Edmonds, 298 SW 610

Olcott v. Reese, 291 SW 261

3 CJS 2d 1047

IV One whose attitude appears to be partisan should not be permitted to appear as amicus curiae.

Re: Ohlhauser's Estate, supra

Central Hanover Bank v. Soranac River Power Corp.,
278 NYS 203

United States of America v. Loew's Inc., DC NY,
1957, 20 FRD 423

State v. Klink, 254 SW 2d 650

Casey v. Male, 164 A 2d 374

V Where parties are adequately represented by counsel the need of assistance can not be assumed and an amicus curiae should not be appointed.

Northern Securities Co. v. United States, 1903,
191 US 555, 24 S Ct. 119, 48 L Ed 229

Petition of Oskar Tiedemann & Co., DC Del., 1960,
183 F Supp 129

United States of America v. Loew's Inc., supra

B.

It was an abuse of the Court's discretion to order petitioners to serve the amici with all papers and pleadings and to permit the amici to participate in pre-trial motions, pre-trial conferences and the production of evidence.

I An amicus curiae who represents a private interest may not participate in the trial of the case and must accept the case before the court with the issues made by the parties.

Dawes v. Siberman, 56 NYS 2d 902

Casey v. Male, 164 A 2d 374

N. Y. Shipping Assoc. v. I.L.A., 154 NYS 2d 360

II An amicus is not a party and cannot assume the functions of a party.

Kemp v. Rubin, 64 NYS 2d 510

Re: Ohlhauser's Estate, supra

Hyde v. Huffines, 341 SW 2d 763

III The order of this Court requiring that all papers and pleadings be served on the amici, allowing the amici to take part in pre-trial conferences and motions, and permitting the amici to produce evidence subverts the office of amicus curiae and is tantamount to full intervention.

United States of America v. Loew's Inc., supra

Kemp v. Rubin, supra

Broome v. Smith, 265 SW 2d 897

Klein v. Liss, 43 A2d 757

Attorneys for petitioners:

Robert E. Wilson, Jr.
4332a Easton Ave.

Joseph S. McDuffie
2847 Union Blvd.

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722 Chestnut

Of Counsel:

Wyvetter Younge
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Emanuel Williams
Margaret B.Wilson
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LOUIS FORD, et al, Petitioners,	)	No. 64 C 53
vs.	)	Court No. 2
WILLIAM BOEGER, Respondent.	)	

POINTS AND AUTHORITIES

A.

It was an abuse of the Court's discretion to appoint Wayne L. Millsap and John P. Montrey as amici curiae in this cause.

I An amicus curiae, literally "friend of the court" is one not a party who advises or informs the court.

Re: Ohlhauser's Estate, 101 NE 2d 827

3 CJS 2d 1046, Amicus Curiae

4 Am. Jur. 2d 109, Amicus Curiae

II A true amicus curiae is without special interest in the litigation.

Allen v. County School Board of Prince Edward County, DC Va., 28 FRD 358

Kline v. Weaver, 348 SW 2d 379

Burger v. Burger, 293 SW 2d 122

III An attorney for a party ordinarily should not be appointed as amicus curiae.

Universal Oil Products Co. v. Root Refining Co., 1946, 328 US 575, 66 S Ct. 1176, 90 L Ed. 1447

Walker County Lumber Co. v. Edmonds, 298 SW 610

Olcott v. Reese, 291 SW 261

3 CJS 2d 1047

IV One whose attitude appears to be partisan should not be permitted to appear as amicus curiae.

Re: Ohlhauser's Estate, supra

Central Hanover Bank v. Soranac River Power Corp., 278 NYS 203

United States of America v. Loew's Inc., DC NY, 1957, 20 FRD 423

State v. Klink, 254 SW 2d 650

Casey v. Male, 164 A 2d 374

V Where parties are adequately represented by counsel the need of assistance can not be assumed and an amicus curiae should not be appointed.

Northern Securities Co. v. United States, 1903, 191 US 555, 24 S Ct. 119, 48 L Ed 229

Petition of Oskar Tiedemann & Co., DC Del., 1960, 183 F Supp 129

United States of America v. Loew's Inc., supra

B.

It was an abuse of the Court's discretion to order petitioners to serve the amici with all papers and pleadings and to permit the amici to participate in pre-trial motions, pre-trial conferences and the production of evidence.

I An amicus curiae who represents a private interest may not participate in the trial of the case and must accept the case before the court with the issues made by the parties.

Dawes v. Siberman, 56 NYS 2d 902

Casey v. Male, 164 A 2d 374

N. Y. Shipping Assoc. v. I.L.A., 154 NYS 2d 360

II An amicus is not a party and cannot assume the functions of a party.

Kemp v. Rubin, 64 NYS 2d 510

Re: Ohlhauser's Estate, supra

Hyde v. Huffines, 341 SW 2d 763

III The order of this Court requiring that all papers and pleadings be served on the amici, allowing the amici to take part in pre-trial conferences and motions, and permitting the amici to produce evidence subverts the office of amicus curiae and is tantamount to full intervention.

United States of America v. Loew's Inc., supra

Kemp v. Rubin, supra

Broome v. Smith, 265 SW 2d 897

Klein v. Liss, 43 A2d 757

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APR 21 1964

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LOUIS FORD, et al,
Petitioners,
vs.
WILLIAM BOEGER,
Respondent.

No. 64-C-53 (2)
Habeas Corpus

MEMORANDUM

Petitioners submit the following memorandum in support of their motion to set aside the Court's order appointing Wayne L. Millsap and John P. Montrey as amici curiae and requiring service of all papers and pleadings on said amici curiae and permitting them to participate in pre-trial conferences and pre-trial motions.

I.

For the purpose of the argument contained in this memorandum it is assumed that the statements and allegations contained in petitioners motion are true. It therefore appears that Mr. Millsap and Mr. Montrey have a partisan interest in the cause and desire to conduct a vigorous adversary proceeding to protect their personal interest and/or the interests of their client, the Jefferson Bank and Trust Company.

An amicus curiae is one not a party to the proceeding who advises or informs the Court, or one who is allowed to appear to protect an interest he represents, 3 CJS 2d 1046. Courts are usually inclined to be rather lenient in the granting of applications for amicus curiae. In criminal cases the courts have permitted and encouraged the use of amicus curiae on the behalf of defendants and this is particularly true when the defendant consents and the prosecution raises no objection. It is most unusual, however, to find an amicus curiae appearing on behalf of the prosecution. The instant case arises out of convictions and imprisonment for criminal contempt. The St. Louis Court of Appeals determined that criminal contempt was not a crime and found nothing ethically or legally wrong in prosecutions by a private part. Of course when a private party engages in such conduct they open themselves up for litigation and other unpleasant results which they naturally are desirous of avoiding. At the present time the Jefferson Bank and its attorney are faced with the strong possibility of litigation from the four persons who were discharged by the St. Louis Court of Appeals. Wayne Millsap and John Montrey quite naturally do not want this potential litigation increased by fifteen more. It is quite clear that they wish to appear to protect an interest they represent. It is quite proper in some circumstances to appoint an amicus curiae who has an interest in the case, but that interest should be directly related to the issues presently before the Court and the interest to be protected should be general in nature and apply to others in similar positions. Petition of Oskar Tiedmann & Co., DC Del., 1960, 183 F Supp. 129

Petitioners have heretofore submitted to this Court a number of authorities were it was held improper to appoint persons with a private partisan interest as amicus curiae where their interests were adequately represented. There has been no claim by Millsap and Montrey that the respondent is not adequately represented or that the interest of the public has not been given adequate consideration. They have not even contended that the Jefferson Bank has an interest in the outcome of this litigation. The City of St. Louis has numerous lawyers well qualified and competent to present the opposing view of the case at hand. In the case of Casey v. Male, S.Ct., N.J., 164 A2d 374, the plaintiff (Union Printers League) sought an order requiring the defendant (Commissioner of Department of Labor of New Jersey) to enforce all safety laws pertaining to factories in all publishing plants in the state. The Publishers Bureau and the New Jersey Press Assoc.

representing the publishing plants requested leave to appear as amicus curiae "in support of the defense of the defendant, Raymond Male". The Supreme Court of New Jersey said that it was obvious that the movants sought to appear as advocates and not advisors. The attitude of the movants was patently partisan, and since any interest the movants might have in the subject matter of the action would be adequately represented by counsel in the defense of defendant the application should be denied.

Generally the courts will deny the application by a private and interested party to appear as amicus curiae where the litigant parties are adequately represented by counsel and the public interest adequately protected. Northern Securities Co. v. United States, 1903, 191 US 555, 24 S.Ct. 119, 48 L Ed 229. However, when the application to appear as amicus curiae is made by a public body and where the public interest must be protected, then the public body may rightfully be appointed as amicus curiae. New York Shipping Association v. International Longshoreman's Association, 154 NYS 2d 360. In this case the Union struck their various employers because the Waterfront Commission (a bi-state agency) was attempting to abolish the "shape up". An injunction was obtained by the employers and the President of the Union violated the terms of the injunction. At the trial for contempt the Waterfront Commission asked leave to appear as amicus. The court held that the Commission was entitled to appear as amicus curiae because they were an interested public body and should appear to protect the public interest.

The Supreme Court of the United States in the case of Universal Oil Products Co. v. Root, 328 US 575, 66 S Ct. 1176, commented on the use of attorneys as amici curiae where they also represented private parties. This case orginally involved a patent infringement. Later it developed that one of the judges was bribed. The court then appointed the Root attorneys as amici curiae to present evidence to a master. After the report was filed the Root attorneys, as amici curiae, where allowed attorney fees and costs. The award for fees and costs was appealed to the Supreme Court. The Court said, l.c. 581 (1453), "While the amici curiae formally served the Court, they were in fact in the pay of private clients. Amici by the Court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome. Certainly it is not consonant with the regard for fastidiousness which should govern Courts of equity, to award fees and costs amici curiae who have already been compensated by private clients so that these be reimbursed for what they voluntarily paid."

The Supreme Court of Missouri held the appointment of an amicus curiae in a criminal case to protect the interest of a prosecuting witness was error. State v. Klink, 254 SW 2d 650. This was a prosecution for child molesting. In the trial the prosecuting witness, a nine year old child was placed on the stand and was asked her name and address, and l.c. 657, ". . . at this juncture a lawyer like the ghost in a play, literally walked into the case. The record recits 'Mr. J. E. (coming forward) objecting' . . ." When the lawyer was asked whom he represented he said, "appearing for the ______ representing the father of this little girl." The trial court then noted the family was not entitled to appear, but appointed the lawyer as amicus curiae. The majority of the Court held that the appointment of this amicus curiae plus rulings by the trial court that the prosecuting witness need answer only such questions as she wished was error, but not reversible error. Three of the Judges wrote a hearty dissent, agreeing that error had been committed and contending that reversible error had been committed.

For these reasons petitioners contend the application by Millsap and Montrey to be appointed as amicus curiae should have been denied by the Court in the exercise of its sound judicial discretion and that the order should be revoked and set aside.

II.

THE COURT ERRED IN REQUIRING PETITIONERS TO SERVE ALL DOCUMENTS, PAPERS AND OTHER PLEADINGS ON THE AMICI CURIAE.

An amicus curiae must take the issues as they are formed by the parties, he can not be a party or assume the functions of a party, Re Ohlhausers Estate, 101 NW 2d 827. Millsap and Montrey have been permitted to attend pre-trial conferences and all pre-trial motions, they have participated in the management and control of the case. "An amicus does not occupy the position of an attorney for a party and is not vested with the management of the case." Hyde v. Huffines, 341 SW2d 763, l.c. 776.

The order requiring service of all papers, documents and briefs upon the amici places an additional burden on the petitioners. They are being required to assume additional duties and expense to provide copies of papers and documents for persons not parties to the litigation. In the case of Kemp v. Rubin, 64 NYS 2d 510, the American Jewish Congress and the NAACP filed a motion to be admitted as amicus curiae in a restrictive covenant case. The Court denied the motion saying it was premature in that the case was not at issue and a different judge might try the case. The Court further said, l.c. 512, ". . . When the petitioners here ask for an order granting them the right . . . to participate in the trial thereof, and all motions and proceedings taken therein, and directing the service of copies of all papers upon them contemporaneously with service upon the opposite party, they ask what is virtually tantamount to full intervention as parties." The Court then held there was no authority for this type of relief and denied the motion for permission to appear as amicus curiae. Jefferson Bank and Trust Co. also wants to have the full rights as an intervenor without appearing as a party.

CONCLUSION

The alleged private partisan interest of Millsap and Montrey does not entitle them to appear as vigorous adversaries under the guise of an amicus curiae. No public interest is involved which requires their appearance and the respondent is adequately represented by counsel. The role of amicus curiae should not be subverted to aid a private party litigant and invest in him aspects of the control and management of the case. The Court's order requiring service of pleadings and papers in addition to other perogatives granted is tantamount to full intervention. For these reasons petitioners' motion to set aside the orders of this Court relating to the amici curiae should be granted.

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The above memorandum served upon the Respondnet and the amici curiae by mailing true copies thereof to Respondent's attorney of record, Eugene P. Freeman, Office of the City Counselor, City Hall, St. Louis, Missouri and John P. Montrey 818 Olive St., St. Louis, Missouri and Wayne L. Millsap, 509 Olive Street, St. Louis, Missouri this 20th day of April, 1964.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EX PARTE LOUIS FORD, IAN GRAND,)
BENJAMIN GOINS, ROBERTA TOURNOUR,)
TAYLOR JONES, KENNETH LEE and) No. 64 C 53 (2)
RONALD GLENN,)

MEMORANDUM

This matter is pending before this Court on petitioners' application for a writ of habeas corpus.

The petitioners were found guilty of criminal contempt in the Circuit Court of St. Louis, Missouri, for violating an injunction issued by that Court. The St. Louis Court of Appeals quashed the petitioners' writ of habeas corpus. The application for a writ of habeas corpus to the Supreme Court of Missouri was denied. This Courtdismissed petitioners' application for a writ of habeas corpus on the ground that they had not exhausted all remedies available to them in the State of Missouri. More particularly, that they had not applied to the Supreme Court of the United States for a writ of certiorari. The petitioners appealed to the Eight Circuit Court of Appeals, and the Eighth Circuit remanded, saying that the petitioners were not required to petition the Supreme Court of the United States for writ of certiorari and further determined that they had exhausted their state remedies within the case of Fay v. Noia, 372 U.S. 391 (1963). The Eighth Circuit in remanding ordered this Court to consider whether the issues sought to be raised are such as to call for a hearing under Townsend v. Sain, 372 U.S. 293 (1963).

In the Townsend case, supra, the Supreme Court laid down the following guide for the federal district courts to follow in habeas corpus cases:

1. It must be determined whether petitioners' allegations, if proved, would establish the right to his release, Townsend case, supra, l.c. 307. The petitioners in this case are entitled to be released if they can show

that they were denied any of their fundamental liberties.

> " . . . State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution."Townsend, supra, l.c. 312.

2. If it is found that the petitioners have alleged a deprivation of constitutional rights, then the remaining question is whether this Court is required to hold a hearing to ascertain the facts which are necessary before this Court can make a decision on the ultimate constitutional question, Townsend, supra, l.c. 309. When does a federal district court have to hold a hearing? The Supreme Court said in the Townsend case, supra, l.c. 312, that the appropriate standar is this:

> " . . . Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."

The Supreme Court set out a more particular guide for the federal district courts to determine whether an evidentiary hearing to a habeas applicant is required. The Supreme Court said under the following circumstances such haring must be granted, Townsend, supra, l.c. 313:

> " . . . If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

The first step is to determine if the allegations in the petitioners' application, if proved, would establish the right to their release. After reading the petitioners' application for writ of habeas vorpus, this Court is of the opinion that the following allegations, if proved, would establish the right to to their release:

1. That the Circuit Court of St. Louis did not have jurisdiction to issue the restraining order which they were found to have violated; In Re Green, 369 U.S. 689 (1962).

2. That they did not receive the type of hearing which is required under the Fourteenth Amendment in a criminal comtempt case. In Re Green, supra.

The other contentions in the petitioners' application are not fundamental liberties which are protected by the Federal Constitution:

(1) the Supreme Court of Missouri failing to resolve a conflict of opinions between the Springfield Court of Appeals and the St. Louis Court of Appeals on the interpretation of Supreme Court Rule 92.09 and Mo. R.S. 1959, Sec. 526.070, as to the requirements of the indemnity bond;

(2) The fact that under Missouri law a person found guilty of criminal contempt has no appeal but through habeas corpus, which is the same as an appeal in a criminal contempt case, see Curtis v. Tozer, 374 S.W. 2d (1964), except the petitioners had to stay in jail while seeking a review, will not be considered because it is a moot question now;

(3) It is not a denial of a person's fundamental liberty to be punished for contempt of court for violating a restraining order where he had actual notice of the restraining order and proceeded to violate it, even though he was not named in the restraining order;

(4) When a Court has jurisdiction over the person and subject matter, and issues a restraining order, the parties must obey the restraining order until it is reversed by orderly and proper proceedings. If they do not obey the restraining order, they can be punished cor criminal contempt. United States

v. United Mine Workers, 330 U.S. 258, l.c. 293 (1947);

(5) Also, assuming that the sentences and fines were excessive, this Court does not have jurisdiction in a writ of habeas corpus to order their correction. Terrell v. Biddle, 139 F. 2d 32 (8th Cir. 1943), cert. den. 321 U.S. 794, rehear. den. 322 U.S. 767, rehear. den. 322 U.S. 769. Conley v. Cox, 138 F. 2d 786 (8th Cir. 1943). Also bee 4 Barron & Holtzoff, Federal Practice and Procedure, Sec. 2303.

The next question to be decided is whether under the Townsend case, supra, this Court is required to hold a hearing to ascertain the facts. After reading the petitioners' application and brief, it appears to this Court that the facts are not in dispute, but only the conclusion of law. Therefore, this Court according to the Townsend case, supra, is not required to hold a hearing. The Supreme Court in the Townsend case, supra, at 312, said the following:

> " . . . The appropriate standard . . . is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." (Emphasis added)

Since the facts are not in dispute a hearing is not needed.

For a detailed statement of the facts see Curtis v. Tozer, supra, where the St. Louis Court of Appeals for the State of Missouri reviewed the facts of this case, as well as the facts of two companion cases. This case in the St. Louis Court of Appeals opinion is referred to as No. 31,778.

The Jefferson Bank and Trust Company received a letter from the "Chairman of CORE", dated August 14, 1963, stating that if four full-time negroes were not hired in clerical positions within two weeks, CORE would take direct action against the bank. August 27, 1963, the Bank replied rejecting the proposal, stating that the Bank had no openings. The letter also pointed out that it had learned that CORE planned to sit-in, stand-in and lie-in the Bank on Friday, August 30, 1963.

To prevent such demonstrations the Bank obtained a temporary restraining order of August 30, 1963, which was in the following style:

> "The Jefferson Bank and Trust Company, a corporation,
>
> vs.
>
> "Robert B. Curtis, William L. Clay, Charles R. Oldham and Marian Oldham, Lucien Richards, Richard Daly, Walter Hays, Rev. Charles Perkins, Norman Seay, Herman Thompson, Melvin West, Individually and as representatives of a class known as St. Louis Committee of Racial Equality.
>
> No. 57945-E"

The temporary restraining order required the defendants to "desist and refrain" from demonstrating so as to prevent the operation of the Bank's business, etc., at the Jefferson Bank and Trust Company, until the hearing of and ruling upon the order to show cause. Peaceful picketing was not prohibited. The acts the temporary restaining order prevented are quoted in the Curtis case, suprs.

The first alleged vilation of the restraining order took place on August 30, 1963, which case is pending in this Court, No. 64 C 53 (3), and it was on of the companion cases to this case in the Circuit Court of Appeals' decision reported in Curtis v. Tozer, 374 S.W. 2d 557. (1964).

The St. Louis Court of Appeals said that the best expalnation of why the motion for attachment was filed against these petitioner is stated in the brief filed by the petitioners in the St. Louis Court of Appeals. The brief says:

> "On Friday, October 4, 1963, the petitioners herein went to the Jefferson Bank and Trust Company and entered said bank carrying signs pinned or fastened to the reading '4 JOBS'. Inside the bank they sang freedom songs, locked arms, sat and stood in front of the entrances of said bank. While petitioners were inside said bank, an official of the bank read to them a copy of the restraining order dated August 30, 1963. The petitioners had not prior to that time been served with a copy of the restraining order. After said order was read by the official of the bank, a request was made to petitioners to leave the bank. The petitioners refused to leave the bank.

> There were on hand police officials who promptly arrested petitioners and placed them in custody, removed them bodily from the bank to the police headquarters. They were all charged with peace distrubance and with trespassing. The arrests and placing petitioners in custody took place between 4:00 p.m. and 6:00 p.m. on Friday, October 4, 1963." Curtis v. Tozer, supra, l.c. 596.

JURISDICTION

This Court must determine whether the Circuit Court of St. Louis has jurisdiction to issue a temporary restraining order preventing sit-ins, lie-ins and stand-ins for the purpose of obtaining four jobs for negroes.

The petitioners claim that under the National Labor Relations Act, CORE's demand that Jefferson Bank and Trust Company hire four negroes is a labor dispute involving an unfair labor practice under 29 U.S.C.A. 157, which is within the preempted field of the federal government.

To determine whether the petitioners' contention that the Circuit Court of St. Louis did not have jurisdiction over the subject matter, this Court must answer the following questions:

1. Was there a labor dispute?
2. If there was a labor dispute, did it involve an unfair labor practice under 29 USCA 157, which is within the preempted field of the federal government?

The term "labor dispute" is defined in the Norris-LaGuardia Act, 29 U.S.C.A. 113(c) and the National Labor Relations Act, 29 U.S.C.A. 152(9). The following is the definition under 29 U.S.C.A. 113(c):

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regradless of whether or not the disputants stand in the proximate relation of employer and employee."

The definition of "labor dispute" under the National Labor Relations Act, 29 U.S.C.A. 152(9), is very similar to the definition of a "labor dispute" under the Norris-LaGuardia Act, supra. The following statement by the Supreme Court of Pennsylvania in Navios Corporation v. National Maritime Union of America, 402 Pa. 325,166 A. 2d 625, 630 (1960), cert. den. 366 U.S. 905 (1961), rehear. cert. den. 366 U.S. 941 (1961), is significant:

> "The definition of labor dispute in the National Labor Relations Act is identical with the definition of labor dispute in the Norris-LaGuardia Act, except that the latter Act does not include the word "tenure" and uses the conjunction phrase, 'whether or not', instead of the more simple 'whether'. It follows, therefore, that if the facts of a case constitute a labor dispute within the meaning of the Norris-LaGuardia Act, they also constitute a labor dispute within the meaning of the National Labor Relations Act...." Cert. den. 366 U.S.905 and rehear. den. 366 U.S. 941.

In New Negro Alliance v. Sanitary Grocery Co.,303 U.S. 552 (1938), an association of Negroes, New Negro Alliance, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises, requested a grocery company, Sanitary Grocery Co., to adopt a policy of employing Negro clerks in certain of its stores in the course of personnel changes. Sanitary Grocery denied the request and New Negro Alliance caused one person to patrol in front of one of Sanitary's stores carrying a sign stating: "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" The picket did not coerce or intimidate Sanitary's customers, did not physically obstruct, interfere with, or harass persons desiring to enter the store, the picket acted in an orderly manner, and his conduct did not cause crowds to gather in front of the store.

The Supreme Court held that there was a "labor dispute" under the Norris-LaGuardia Act and that the federal district court did not have jurisdiction to issue an injunction.

In a recent case, Potomac Elec. Power Co.v. Washington Chap. of Congress of Racial Equality, 210 F. Supp. 418 (D.C. D.C. 1962), involving the Washington Chapter of the Congress of Racial Equality, Judge Holtzoff was of the opinion that CORE's demand on an employer did not constitute a "labor dispute".

In the Potomac case, supra, CORE requested that qualified members of the colored race be employed as line-men and meter readers. Thereafter, CORE announced that to achieve this end it would distribute to the Potomac's customers several thousand stamps or pasters stating "We believe in merit hiring". The customers of Potomac were requested to affix the stamps to the stubs of Potomac's bills when the stubs were returned to Potomac. Potomac alleged that it would sustain substantial and irreparable injury if the stamps were put on the stubs, because the stubs are put into computing or calculating machines and if the stamps are on the stubs, it would be impossible to feed the stubs into the calculating machines.

Judge Holtzoff at page 420 in the Potomac case, supra, gave the following reasons why there was not a labor dispute:

> ". . . Obviously, in this instance there is no labor dispute in the ordinary sense of that term: there is no dissension between employer and his employee; there is no disagreement between an employer and a labor organization; and there is no controversy between an employer and applicants for employment or an organization of applicants. The defendant organization does not purport to include applicants for employment in its membership, nor does it profess to be their authorized representative. It interjects itself as an interloper. It is urged, however, that the situation presents a labor dispute within the meaning of the Norris-LaGuardia Act, as construed in New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S.Ct. 703, 82 L. Ed. 1012. In that case an association of negroes in an effort to persuade a grocery compahy to employ colored clerks, organized a group of pickets, who patrolled in front of one of the defendant's stores and carried placards urging prospective customers not to patronize the store because no negroes were employed there. The Supreme Court held that this situation constituted a labor dispute within the meaning of the Norris-LaGuardia Act. The case is distinguishable on its facts, in that the activities of which the company complained consisted of peaceful picketing in front of the store, instead of far-reaching consequential injuries such as are confronted in the case at bar. As Mr. Justice Roberts pointed out (p. 559,58 S. Ct. 706):
>
> > 'The patrolling did not coerce or intimidate respondent's customers; did not physically obstruct, interfere with, or harass persons desiring to enter the store, the picket acted in an orderly manner, and his conduct did not cause crowds to gather in front of the store.'

> "The objectionable activities in the instant case are of an entirely different character and cannot be said to be a legitimate concomitant of any labor dispute, even it this term can be stretched in the far-fetched manner urged by counsel for the defendants."

This Court is of the opinion that the facts of this case are very similar to the Potomac case and that there was not a labor dispute in this case for the same reasons Judge Holtzoff stated in the Potomac case.

In the Potomac case, Judge Holtzoff decided the case as though there was a labor dispute, because Potomac, by showing that substantial and irreparable injury would be sustained by it if an injunction was not granted, came within 29 U.S.C. 107 of the Norris-LaGuardia Act, which permits the federal district courts to issue injunction under the above circumstance. If this case was controlled by the Norris-LaGuardia Act, the acts of the petitioners would come within 29 U.S.C. 107.

It must be remembered that 29 U.S.C. 101 of the Norris-LaGuardia Act, which prevents courts of the United States from issuing restraining orders growing out of a labor dispute, does not apply to state courts. 29 U.S.C. 113 (d), states:

> "(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

Also see McCarroll v. Los Angeles County Dist. Coun. of Carpenters, 49 Cal. 2d 45, 315 P. 2d 322 (1957), cert. den. 355 U.S. 932 (1958).

The question of whether the St. Louis Circuit Court had jurisdiction to issue a temporary restraining order can be determined without deciding whether a labor dispute existed. As stated above, the St. Louis Circuit Court had jurisdiction to issue a temporary restraining order under the Norris-LaGuardia Act even though a labor dispute existed. That brings us to the National Labor Relations Management Act.

The petitioners claim that there was a labor dispute involving an unfair labor practice under 29 U.S.C.A. 157 and, therefore, the state court did not have jurisdiction because this is within the preempted field of the federal government.

Without deciding whether a labor dispute existed, it can be determined that an unfair labor practice did not exist. It can readily be seen that the act the petitioners contend is an unfair labor practice is the alleged discriminatory hiring policy of the Jefferson Bank and Trust Company. More particularly, the Bank's refusal to hire four negroes.

The question is whether the Bank's refusal to hire four negroes constitutes an unfair labor practice under the National Labor Relations Management Act. The answer is no. The Supreme Court in Labor Board v. Jones & Laughlin, 301 U.S. 1, at 45 said:

> ". . . The act [National Labor Relations Act] does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

In Associated Press v. Labor Board, 301 U.S. 103, at 132, the Supreme Court said:

> "The act [National Labor Relations Act] does not compel the petitioner to employ anyone; . . . "

At page 129 the Supreme Court said:

> "The National Labor Relations Act seeks to protect the employees' right of collective bargaining, and prohibits acts of the employer discriminating against employees for union activities and advocacy of such bargaining, by denominating them unfair practices to be abated in accordance with the terms of the act."

The Eighth Circuit Court of Appeals in Farmers Co-Operative Co. v. National Labor Relations Board, 208 F. 2d 296 (1953), said at page 303:

> ". . . An employer may hire and discharge at will, so long as the action is not based on opposition to union activities."

The state court had jurisdiction to issue a temporary restraining order prohibiting sit-ins, lie ins and stand-ins, which would disrupt and interfere with Jefferson Bank and Trust Company's business, under Civil Rule 92, V.A.M.S. The fact that the Jefferson Bank and Trust Company did not comply with CORE's demand to hire four negro employees was not an unfair labor practice under 29 U.S.C.A. 157, which the federal government has preempted.

The petitioners claim that the Court by issuing the temporary restraining order violated the Fourteenth Amendment of the United States Constitution. The reason given is that due to the alleged history of Jefferson Bank and Trust Company's discriminatory hiring policy, the state court could not issue a restraining order prohibiting sit-ins, lie-ins and stand-ins, which were for the purpose of forcing the Bank to hire four negroes, because the restraining order furthered the Bank's discriminatory hiring policies. This Court does not go along with this argument. The petitioners were not protesting the Bank's discriminatory hiring policy, but were trying to force the Bank to hire four negroes which is a discriminatory practice. Section 296.020,V.A.M.S., defines what are unlawful employment practices in the State of Missouri:

> "It shall be an unlawful employment practice: (1) For an employer, because of the race, creed, color, religion, national origin, or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment."

The Supreme Court in Hughes v. Superior Court of California for Contra Costa County, 339 U.S. 460 (1950), said the Fourteenth Amendment of the Constitution does not bar a state from using injunctions to prohibit picketing of a place of business solely in order to secure compliance with a demand that its employees be in proportion to the racial origin of its then customers. At page 466, the Supreme Court said:

> ". . . We cannot construe the Due Process Clause as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy . . . . ."

HEARING

Were the petitioners afforded a hearing which meets the due process requirement of the Fourteenth Amendment in criminal contempt cases?

The Supreme Court of the United States In Re Oliver, 333 U.S. 257, (1948), l.c. 275, states that the following test is to determine if procedural due process was granted in criminal contempt cases where the misconduct was not in open court:

> ". . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation."

The Missouri Supreme Court through Missouri Rules of Criminal Procedure, has set up a procedure for criminal contempt committed out of the presence of the court in Rule 35.01 (b).

> ". . . The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the Judge in open court in the presence of the defendant or, on application of the prosecuting attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in these Rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a finding of guilt the court shall enter an order reciting the essential facts constituting the criminal contempt and fixing the punishment."

Rule 35, Missouri Rules of Criminal Procedure is almost identical to Federal Rule of Criminal Procedure 42.

The first question for this Court to determine in order to decide whether the petitioners obtained a hearing which meets the due process requirement under the Fourteenth Amendment is: Did the petitioners have notice that they were charged with criminal contempt?

Notice was given the petitioners, on October 4, 1963, on the hearing on petitioners' attachment process, the following is the pertinent language of the notice:

> "Thereupon the hearing on said attachment progresses before the Court and being terminated the same is submitted to the Court upon the oral pleading, the evidence and proof adduced and the Court having heard and duly considered the same and being sufficiently advised thereof doth find that said alleged contemnors have been duly represented by counsel and having failed to disprove or purge themselves of said contempt by physically hindering and preventing customers of the plaintiff and other members of the public from customary access to tellers' windows and by locking arms in front of the tellers' windows in plaintiff's place of business, or sitting in, lying in or standing in or singing in plaintiff's place of business, thereby interfering with the plaintiff's business or by harassing plaintiff's employees or customers in front of, around or at plaintiff's place of business,. . . . "
>
> "It is further ordered by the court that said alleged contemnors be and appear in this court and in Division Number 2 thereof on Monday, October 7th, 1963 at 10 o'clock a.m., and there and then to show cause, if any, why they should not be punished for contempt of court in violation of the Court's restraining order heretofore issued the 30th day of August, 1963." (Tr. p. 71)

The term "criminal contempt" was not used in the notice. Under Mo. R. Cr. F., 35.01 (b), the contempt is to be described as criminal contempt. As stated earlier, F.R.cr.F. 42(b) is very similar and on the above point it is identical.

The part of the show cause order that gives notice that the petitioners would be tried for criminal contempt is the use of the following language:

> ". . . to show cause, if any, why they should not be punished for contempt of court in violation of the court's restraining order. . . . " (Emphasis added.)

The Supreme Court in the United States v. Mine Workers, 330 U.S. 258 (1947), at page 297, said that the use of the word "punished" could be argued to give adequate notice that the contempt proceeding would be criminal instead of civil. The Supreme Court in footnote 64 cites the Columbia Law Review for authority and Gompers v. Bucks Stove & Range Co.,221 U.S. 418 (1941), but correct date is (1911), saying that the word "punished" can be ambiguous in contempt cases.

This Court is of the opinion that the show cause order given by the Circuit Court of St. Louis stating that the petitioners would be "punished for contempt of court" unless they could disprove or purge the contempt was enough to give the petitioners notice that they would be tried for criminal contempt under the due process requirement laid down in In Re Oliver, supra, Mo. R.Cr. P. 35.01(b) and F.R.cr.P. 42B, because the restraining order forbids an act.

If the restraining order had commanded the petitioners to do an affirmative act and they refused to do the affirmative act, then using the word "punished" in the show cause order would be ambiguous, because this could mean that the petitioners would be put in jail until they performed the act, or it could have meant that the petitioners would be punished for criminal contempt.

The restraining order involved in this case is the prohibitive type of restraining order prohibiting the petitioners from demonstrating, etc., at the Jefferson Bank and Trust Company. Therefore, when the word "punished" was used in the show cause order, it meant only one thing, that the petitioners would be punished for criminal contempt. In other words, if they were found to have committed the acts which were prohibited by the restraining order, their punishment would not be remedial, but it would be punitive to vindicate the authority of the court.

In Gompers v. Bucks Stove & Range Co.,supra, the Bucks Stove & Range Company in its petition made two prayers after stating the acts which violated the restraining order. The first prayer is almost identical to the notice given by the Circuit Court of the City of St. Louis at the attachment hearing: "(1) that the defendants show cause why they should not be adjudged in contempt of court and be punished for the same: and (2) that petitioner may have such other and further relief as the nature of its case may require." The second prayer in the Gompers case is not present in this case and it is that prayer which the Supreme Court said caused the ambiguity in that case.

Once it is found that the petitioners had sufficient notice under Rule 35.01(b), the fact that in the argument for the motion to dismiss the petitioners' attorneys asked if the court was trying them for civil or criminal contempt is irrelevant.

The petitioners also complain that they were not advised of the time the demonstrations took place. They were so advised. The motion to attach the petitioners contained the date; and at the hearing on the attachment, at which all of the petitioners were present, the witnesses, who testified that the petitioners committed the acts which were prohibited by the restraining order, stated the date of the said acts.

The petitioners were told Friday night, October 4, 1963, that they were to show cause, if any, why they should not be punished for contempt on Monday, October 7, 1963, at 10:00a.m. At that time the hearing was continued until 2:00 p.m. while petitioners sought a writ of prohibition, which was denied. Two days to prepare for a hearing to disprove or purge contempt of court seems to be a reasonable amount of time to this Court. See United States v. Barnett, 376 U.S. 681 (1964), at page 686, where a show cause order was issued on September 26th to show cause on September 29th.

It is also clear from the record that the petitioners were represented by counsel and had a chance to testify and call other witnesses.

The United States Supreme Court on December 14, 1964, in the case of Hamm v. City of Rock Hill held that the Civil Rights Act of 1964 applies retroactively to certain sit-ins arising out of violations of the Civil Rights Act of 1964. However, this decision has no bearing on the instant case for the reason that the Civil Rights Act itself is not applicable to the instant situation. Section 703(j) of the 1964 Civil Rights Act provides:

> "(j) Nothing contained in this title shall be be interpreted to require any employer, ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

This section is very similar to the Missouri Statute previously quoted.

As Previously pointed out in this memorandum, when a court has jurisdiction over the person and the subject matter and issues a restraining order, the parties must obey the restraining order until it is reversed by orderly and proper proceedings. If they do not obey the restraining order, they can be punished for criminal contempt.

CONCLUSION

In brief, the record clearly shows that the Circuit Court of the City of St. Louis had jurisdiction of the subject matter and the parties. A restraining order was issued by that court. The petitioners had actual knowledge of the restraining order. They willfully and deliberately violated the restraining order.

Basically, we are confronted with a situation where we must consider the problem of upholding court orders to preserve their integrity and effectiveness as opposed to any procedural defects that may exist. The balance weighs heavily in favor of upholding the orders of the state court, since we have already determined that the procedural defects do not amount to a deprivation of petitioners' constitutional rights.

Accordingly, the writs sought by petitioners will be denied. No further order will be made concerning bail pending further order of this Court or the Court of Appeals for the Eighth Circuit.

Dated this 18th day of December, 1964.

/s/ JAMES H. MEREDITH

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EX PARTE LOUIS FORD, IAN GRAND,)
BENJAMIN GOINS, ROBERTA TOURNOUR,)
TAYLOR JONES, KENNETH LEE AND) NO. 64 C 53 (2)
RONALD GLENN,)
)
)

ORDER

A memorandum filed this day is incorporated in and made a part of this Order.

IT IS HEREBY ORDERED that the writ of habeas corpus sought by petitioners be and the same is hereby denied.

IT IS FURTHER ORDERED that petitioners' bail heretofore approved is continued pending further order of this Court or the Court of Appeals for the Eighth Circuit.

Dated this 18th day of December, 1964.

/s/ JAMES H. MEREDITH

UNITED STATES DISTRICT JUDGE

St Jones

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM 1963

ROBERT B. CURTIS, et al) No. 17599
)
LOUIS FORD, et al) No. 17600
)
MICHELA GRAND, et al) No. 17601
)
APPELLANTS)
)
vs.)
)
WILLIAM BOEGER)
WARDEN OF ST. LOUIS)
MUNICIPAL JAIL,)
)
RESPONDENT)

APPELLANTS' BRIEF

APPEAL FROM THE
DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN
DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT E. WILSON
JOSEPH S. McDUFFIE
R. L. WITHERSPOON
CLYDE S. CAHILL
CHARLES R. OLDHAM
WYVETTER H. YOUNGE
EMANUEL WILLIAMS
MARGARET B. WILSON
ROBERT RATERMANN, all of St. Louis
BILLIE JONES, of East St. Louis, Ill.

Attorneys for Appellants

INDEX TO BRIEF

Page

TABLE OF CASES .... I.

PART ONE

STATEMENT OF CASE .... 2.

PART TWO

POINTS AND AUTHORITIES .... 5.

PART THREE

ARGUMENT.................................... 7.

I MISSOURI SUPREME COURT RULE, 27.26 .... 7.

II EXHAUSTION OF STATE REMEDIES .... 8.

III HABEAS CORPUS AS AN APPELLATE REVIEW........... 13.

IV THE DOCTRINE OF COMITY..... 16.

PART FOUR

CONCLUSION.................................. 18.

TABLE OF CITATIONS

CASES

BROWN V. ALLEN	334 U.S. 443; 73 S. Ct.397
DARR V. BURFORD	339 U.S. 200; 70 S. Ct.587
EX PARTE CLARK	106 S.W. 990,(S. Ct. Mo.)
EX PARTE HAWK	321 U.S. 114; 64 S. Ct.448
FAY V. NOIA	372 U.S. 391; 83 S. Ct. 822
FLEENOR V. HAMMOND	116 F2d 882, (6th CCA)
SISK V WILKINSON	265 S.W. 536
STATE EX REL CHICAGO V BLAND ET AL	88 S.W. 2d 28, (S. Ct. Mo .
STATE V. THOMPSON	324 S.W. 2d 536
TOWNSEND V. SAIN	372 U.S. __; 83 S. Ct. .. 745

ENCYCLOPEDIAS

AMERICAN JURISPRUDENCE, HABEAS CORPUS	Sec. 28, pg. 162-164

CONSTITUTION

UNITED STATES CONSTITUTION	Article III and VI, AMENDMENT XIV

STATUTES

U.S.C.A.	Title 28 Sec. 2254

RULES

MISSOURI SUPREME COURT RULE	27. 26

PART ONE

STATEMENT OF THE CASE

This is an appeal from the ruling of the United States District Court of Missouri, Eastern Division, " . . . in its discretion" in declining "to exercise its jurisdiction and entertain the petitioners' writ for federal habeas relief, without the opportunity having been first presented to the United States Supreme Court to grant or deny a petition for certiorari."

Appellants' application for habeas corpus raised basic questions of due process, equal protection of the laws and violations of rights secured to them under both the State and Federal Constitutions and further alleged that, "All adequate state remedies available to petitioners have been exhausted by them."

The defense made to the claims was a denial of any violation of basic rights secured by state and federal constitutions; that the federal questions had not been properly preserved; and a general denial of the allegation of exhaustion of state remedies.

The District Court heard argument on the questions of exhaustion of state remedies and its right to exercise its discretion to assume or not to assume jurisdiction. In its opinion the District Court held that the appellants had not exhausted their state remedies for the following reasons:

(1) appellants had not filed motions in the trial court under Missouri Supreme Court Rule 27.26 to permit the trial court to correct its own errors; (2) that under Missouri law habeas is a part of the statutory appellate review structure in criminal contemptand the judgments of contempt had been affirmed; and therefore, appellants should have sought relief via certiorari in the Supreme Court of the United States; (3) the District Court should not act on federal questions in an appellate capacity to the Supreme Court of Missouri.

The causes before this Court arise from separate alleged violations of a restraining order which had issued from Division No. 2 of the Circuit Court of the City of St. Louis, Honorable Michael J. Scott, Judge, presiding. The alleged violations of the restraining order involved different parties, three distinct incidents and three separate trials for contempt in the Circuit Court of Missouri.

After trial in the Circuit Court of Missouri, appellants were ordered to appear before Judge Scott to receive the judgment of the court. Each of the appellants were found guilty of Contempt of Court and Judge Scott punished them "as for criminal contempt" and imposed definite jail terms ranging from sixty days to one year in the City Jail, fines ranging from $500.00 to $1,000.00, and costs.

The post trial procedures for the purposes of the issues presented in this appeal may be considered as identical.

Appellants made applications for bail and stays pending filing of motions for rehearings, new trials or appellate reviews of the trial court's findings and decisions. All motions for bail, stays of execution, rehearings or new trials were denied and appellants were committed to the custody of respondent and began serving their jail terms.

An application for habeas corpus on the question of bail was then filed in the St. Louis Court of Appeals which was denied on the theory that appellants had been convicted of criminal contempt from which no appeal would lie. A second petition for habeas corpus was filed in the same Court to test the legality of appellants' restraint. The writ was issued and appellants were admitted to bail. On January 15, 1964, the Court of Appeals discharged four of the original defendants. However, as to these appellants, the Court of Appeals remanded them to the custody of respondent.

Appellants filed an application for writs of habeas corpus in the Supreme Court of Missouri on January 23, 1964 and requested that they be admitted to bail. The Missouri Supreme Court denied bail and thereafter denied the writs on January 31, because the "petition and exhibits filed, including transcript of evidence submitted by petitioners . . ., fail to show a claim on which relief can be granted for the reasons stated in the opinion of the St. Louis Court of Appeals . . .."

Appellants did not seek certiorari from the Supreme Court of the United States, but on February 7, 1964, filed an application for writs of habeas corpus in the United States District Court for the Eastern District of Missouri, Eastern Division. On February 7, 1964, the Court issued its order to the respondent to show cause, on February 17th, why the writ should not issue. On motion of the respondent, the time was extended to February 20th, at which time respondent filed his return and the Court set a hearing on the merits for February 27th. Appellants filed their answer to respondent's return, on February 25th, and on February 27, 1964, the Court denied the writs of habeas corpus. The next day, February 28th, the Court denied appellants' applications for Certificates of Probable Cause. On that same day, this Court granted appellants' Applications for Certificates of Probable Cause and appellants filed Notices of Appeal in the District Court from the action of said Court in denying appellants' applications for writs of habeas corpus.

Appellants challenge as erroneous the ruling of the District Court that they had failed to exhaust State remedies available to them, and the Court's refusal to hold a hearing on the merits of their applications for federal habeas relief.

PART TWO

POINTS AND AUTHORITIES

THE UNITED STATES DISTRICT COURT ERRED IN ITS SUGGESTION THAT MISSOURI SUPREME COURT RULE 27.26 AFFORDS APPELLANTS A STATE REMEDY NOW AVAILABLE TO THEM.

STATE V. THOMPSON, 324 S.W.2d 133
R.S. Mo., 1959, Sec. 532.040
MISSOURI SUPREME COURT RULE, 27.26

II.

THE UNITED STATES DISTRICT COURT ERRED IN RULING THAT APPELLANTS FIRST SHOULD HAVE SOUGHT CERTIORARI IN THE UNITED STATES SUPREME COURT.

FAY V. NOIA, 372 U.S. 391, 83 S.Ct. 822
DARR V. BURFORD, 339 U.S. 200, 70 S.Ct. 587
EX PARTE HAWK, 321 U.S. 114, 64 S.Ct. 448
BROWN V. ALLEN, 334 U.S. 443, 73 S.Ct. 397

III.

THE UNITED STATES DISTRICT COURT ERRED IN TREATING THE APPELLANTS' HABEAS PROCEEDINGS IN THE COURTS OF MISSOURI AS A PART OF THE STATUTORY APPELLATE REVIEW PROVIDED BY THE STATE OF MISSOURI.

FAY V. BOIA, infra
STATE EX REL CHICAGO V. BLAND et al, 88 S.W. 28, S.Ct. Mo.
EX PARTE CLARK, 106 S.W. 990, S.Ct. Mo.
SISK V. WILKINSON, 265 S.W. 536
25 AM. JUR., HABEAS CORPUS, Sec. 28, pp. 162-164

IV.

THE UNITED STATES DISTRICT COURT ERRED IN CONSTRUING ITS POSITION IN THE "FEDERAL LADDER" AND COMITY BETWEEN STATE AND FEDERAL COURTS AS DENYING TO IT THE DUTY TO HEAR AND DETERMINE APPELLANTS' APPLICATION FOR WRITS OF HABEAS CORPUS.

TOWNSEND V. SAIN, 372 U.S._____, 83 S.Ct. 745
FAY V. NOIA, infra
FLEENOR V. HAMMOND, 6th CCA, 116 F.2d 982
UNITED STATES CONSTITUTION - Articles 3 and 6 and
Fourteenth Amendment

PART THREE

ARGUMENT

I

THE UNITED STATES DISTRICT COURT ERRED IN ITS SUGGESTION THAT MISSOURI SUPREME COURT RULE 27.26 AFFORDS APPELLANTS A STATE REMEDY NOW AVAILABLE TO THEM.

The District Court in its opinion on page 2, and in note 2, page 7, and by its questioning of counsel during oral argument on the questions of the District Court's jurisdiction, suggested that the procedures under Supreme Court Rule 27.26 (which appellants admit were never used by them) may still be open to them as a relief. That rule provides, in part, as follows:

> "A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of the State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. * * * If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

This failure to use this Rule does not bar appellants' rights to writs of habeas corpus. The Rule provides for an alternative method to habeas relief for determining the legality of the detention in the Court imposing the sentence. State v. Thompson, 324 SW 2d 133 (S. Ct. en banc, 1959). However, the procedure under Rule 27.26 is not cumulative and where habeas corpus has been used, the remedy provided for in the Rule is not available. R.S. Mo., 1959, Sec. 532.040.

Here, appellants have used habeas proceedings for post-trial relief, therefore Rule 27.26 is no longer available to them and is not a bar to habeas relief in the United States District Court.

II.

THE UNITED STATES DISTRICT COURT ERRED IN RULING THAT APPELLANTS FIRST SHOULD HAVE SOUGHT CERTIORARI IN THE UNITED STATES SUPREME COURT.

Prior to the Supreme Court's opinion in Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822 (1963) the practice was well settled that in the majority of cases coming to the United States District Courts for habeas relief for persons detained pursuant to a state court judgment of conviction for a criminal offense, certiorari in the United States Supreme Court first must have been denied. This practice evolved from the application of the policy of comity which found its practical expression in the requirement that an applicant for habeas relief in the United States District Courts must first have exhausted his available remedies in the courts of the state of his conviction. Available remedies in the state courts being deemed to include review in the United States Supreme Court by writ of error. This writ by statute was a writ of right and the practice seems to be well founded.

However, after review of a decision of a state court in the Supreme Court of the United States by writ of error was abolished and certiorari was substituted, review was no longer a matter of right, but was one of discretion. A fiction then developed in the practice and review by certiorari too was treated as exhaustion of state remedies. This practice became fixed in the law and was finally enunciated in Ex Parte Hawk, 321 U.S. 114, 64 S. Ct. 448, Darr v. Burford, 339 U.S. 200, 70 S. Ct. 587, and Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, as requiring appellate review by means of an application for a writ of certiorari in the Supreme Court of the United States to the State Supreme Court as an exhaustion of state remedies where United States Constitutional questions had been squarely raised before the state supreme court. If certiorari was denied, then the applicant could apply for habeas relief in the Federal District Court. The exception to this "dual journey" was for the applicant to plead and show exceptional circumstances.

Fay v. Noia, supra, changed this circuitous route and made a direct approach to the United States District Court for habeas relief, directly from the state supreme court possible after the exhaustion of all available state remedies.

Briefly stated, the facts in the Noia case were these: Noia had been convicted for murder on a coerced confession and received a sentence of life imprisonment. He did not appeal. Some _____ years later, Noia sought his release by coram nobis in the state court. Relief was denied on the ground of his default in procedure due to his failure to timely appeal his conviction. Certiorari to the United States Supreme Court was denied and Noia sought redress through the federal system in the United States District Court. The writ was denied because of the default in state procedures and an appeal was prosecuted to the United States Court of Appeals for the Second Circuit. The Court of Appeals ruled favorably for Noia because of the unusual circumstances, inter alia; and on application of respondent, the United States Supreme Court granted certiorari and upheld the judgment of the United States Court of Appeals, but not for the same reasons, i.e. unusual circumstances. Fay v. Noia, supra, l.c. 827. The Court of Appeals opinion was based on Darr v. Burford, supra.

In the Noia case, the Supreme Court made several "holdings" which are determinative of the questions raised here. The Court, at page 827 stated:

> "Federal courts have power under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies; the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute. Noia's failure to appeal was not a failure to exhaust 'the remedies available in

the courts of the State" required by Sec. 2254;"

at page 846

> ". . . we reject as unsound in principle, as well as not supported in authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision."

at page 847

> ". . . We hold that Sec. 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court."

> "Noia timely sought and was denied certiorari here from the adverse decision of the New York Court of Appeals on his coram nobis application, and therefore the case does not necessarily draw in question the continued vitality of the holding in Darr v. Burford, supra, that a state prisoner must ordinarily seek certiorari in this Court as a precondition of applying for federal habeas corpus. But what we hold today necessarily overrules Darr v. Burford to the extent it may be thought to have barred a state prisoner from federal habeas relief if he had failed timely to seek certiorari in this Court from an adverse state decision. Furthermore, our decision today affects all procedural hurdles to the achievement of swift and imperative justice on habeas corpus, and because the hurdle erected by Darr v. Burford is unjustifiable under the principles we have expressed, even insofar as it may be deemed merely an aspect of the statutory requirement of present exhaustion, that decision in that respect also is hereby overruled."

> ". . . Nevertheless, the Court in Darr v. Burford put a gloss upon these words to include petitioning for certiorari in this Court, which is not the court of any State, among the remedies that an applicant must exhaust before proceeding in federal habeas corpus. It is true that before the enactment of Sec. 2254 the Court had spoken of the obligation to seek review in this Court before applying for habeas. * * * But that

> was at the time when review of state criminal judgments in this Court was by writ of error. Review here was thus a stage of the normal appellate process. The writ of certiorari which today provides the usual mode of invoking this Court's appellate jurisdiction of state criminal judgments, "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 19(1). Review on certiorari therefore does not provide a normal appellate channel in any sense comparable to the writ of error.

at page 848

> The rationale of Darr v. Burford emphasized the values of comity between the state and federal courts, and assumed that these values would be realized by requiring a state criminal defendant to afford this Court an opportunity to pass upon state action before he might seek relief in federal habeas corpus. But the expectation has not been realized in experience.
>
> Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances.

and further at page 849

> . . . We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfieted his state court remedies.

These express "holdings" in the Noia case can be summarized in light of the Burford case with which Noia was primarily concerned, as follows:--

First. Certiorari in the United States Supreme Court is not a prerequisite to resort to the United States District Court in a habeas proceeding to review the judgment of the supreme court of the state.

Second. 28 USCA 2254 does not make certiorari (a writ of grace) a necessary component of exhaustion of state remedies as it is not a remedy "available in the courts of the state".

Third. All procedural hurdles erected by Darr v. Burford which prevented swift and imperative justice on habeas corpus are expressly overruled.

Fourth. Section 2254 is limited in its application to state remedies available to the habeas applicant at the time he files his application in the federal court.

Fifth. Habeas applicants who deliberately bypass the orderly procedures of the state courts and in so doing forfeit state court remedies may be denied federal habeas relief.

Appellants submit that they have timely applied for all adequate relief in the courts of the State of Missouri by applications for writs of habeas corpus; that substantial Federal Constitutional questions were there presented for decision by the state courts; and further that the requirements of comity and the exhaustion of state remedies as espoused by the Burford case are no longer binding upon the United States District Court as determinative of its jurisdiction in a habeas proceeding.

III.

THE UNITED STATES DISTRICT COURT ERRED IN TREATING APPELLANTS' HABEAS PROCEEDING IN THE COURTS OF MISSOURI AS A PART OF STATUTORY APPELLATE REVIEW PROVIDED BY THE STATE OF MISSOURI.

The District Court erred in treating appellants' habeas proceedings in the St. Louis Court of Appeals and their application for writs of habeas corpus in the Supreme Court of Missouri, which were denied, as being in the nature of appeal procedures. It is a well established decisional, as well as encyclopedic, rule that the writ of habeas corpus does not have the force and effect of such a proceeding as an appeal, error proceeding or writ of certiorari. It is essentially a writ of inquiry and is granted to test the right under which a person is detained. The purpose of the writ is not to determine the guilt or innocence of a prisoner but only to ascertain whether he is restrained of his liberty by due process of law.

Under Missouri law there is no appeal in cases of criminal contempt. Ex Parte Clark,-Mo., 106 SW 990; State ex rel Chicao vs. Bland, et al., 88 SW 28 (Sup. Ct. Mo. 1905). In such contempts, however, the court to which an application for a writ of habeas corpus is made may go behind the recitals of the judgment and determine for itself the accuracy of those recitals and their sufficiency to support the judgment. The right to go behind the recitals in the findings and commitment orders is not the same as the rights afforded in the normal appeal procedure. On an appeal, the appellate court, particularly in equity has great powers. The case may be retried de novo on the record giving due consideration to the fact that the trial court had an opportunity to view the witnesses, and the appellate courtthen can enter a judgment in accordance with the evidence, remand the case for new trial, modify the judgment or reverse the decision of the lower court. No such power exists in habeas proceedings in Missouri. Here the court has the power to either remand the petitioners to custody or discharge them. The right to review the sufficiency of the evidence to support a conviction can not be eqated with a statutory right of appeal. This distinction is recognized in Missouri, Sisk v. Wilkinson, 265 S.W. 536. The writ of habeas corpus was neither intended to have, nor does it have, the primary function of a proceeding for the review of errors committed by a trial court within its jurisdiction, andconsequently, does not have the force and effectof such a proceeding as an appeal, error proceeding, or writ of certiorari. 25 Am. Jur., Habeas Corpus, Sec. 28, pp. 162-164. ". . . the traditional characterization of the writ of habeas corpus as an original civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceeding, or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings . . . ." Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822.

IV.

THE UNITED STATES DISTRICT COURT ERRED IN CONSTRUING ITS POSITION IN THE "FEDERAL LADDER" AND COMITY BETWEEN STATE AND FEDERAL COURTS AS DENYING TO IT THE DUTY TO HEAR AND DETERMINE APPELLANTS' APPLICATION FOR WRITS OF HABEAS CORPUS.

The doctrine of comity between state and federal courts is a necessary development of restraint for the preservation of procedural harmony in the orderly administration of criminal justice as between sovereign powers. However, the doctrine can not be extended to limit the power of federal courts under the federal habeas statute. It is but the postponement of federal jurisdiction and not a denial of it. And federal jurisdiction is not limited or circumscribed by a state court decision. Fleenor v. Hammond, 6th CCA, 116 F.2d 982.

The doctrine of comity is but a doctrine of abstension without prejudice to federal rights whereby one court defers action on causes properly within its jurisdiction until the courts of another sovereignity with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

In the instant case, theappellants chose the alternative review procedure of habeas corpus to writs of certiorari in the St. Louis Court of Appeals, in seeking a review of their unconstitutional restraint; and thereafter upon a denial of relief, pursued similar proceedings in the Supreme Court of Missouri, which court denied their writs of habeas corpus, thus exhausting all state remedies available to appellants.

The Supreme Court of the United States commented on the question of comity in the case of Fay v. Noia, supra, at page 848 the court said:

> "The rationale of Darr v. Burford emphasized the values of comity between the state and federal courts, and assumed that these values would be realized by requiring a state criminal defendant to afford this Court an opportunity to pass upon state action before he might seek relief in federal habeas corpus. But the expectation has not been realized in experience. On the contrary the requirements of Darr v. Burford hasproved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes.

The Supreme Court then pointed out that it would be much better to have a complete record made in the DistrictCourt which has facilities for taking evidence and preparing a record and added this comment in the Noia case;

> ". . . Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide."

The doctrine of comity is based on the erroneous premise of equal sovereign powers, state and federal governments. The doctrine of comity cannot limit the power and duty of the district courts under the federal habeas statutes, Articles 3 and 6 and Amendment 14 of the United States Constitution. Substantial constitutional questions have been raised by appellants by their pleadings and it was the duty of the district court to issue its writ of habeas corpus and grant the appellants a hearing. Townsend v. Sain, 372 U.S. _____, 83, S.Ct. 745.

CONCLUSION

The District Court, in this instance, is not vested with the power to deny a hearing to these appellants and erred in denying the writ of habeas corpus.

MAR 4 1964

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

In the matter of the petition of)
Robert B. Curtis, William L. Clay,)
Lucien Richards, Rev. Charles) No. 64 C 52 (3)
Perkins and Norman Seay.)

In the matter of the petition of)
Louis Ford, Ian Grand, Benjamin)
Goins, Roberta Tournour, Taylor) No. 64 C 53 (2)
Jones, Kenneth Lee and Ronald)
Glenn.)

In the matter of the petition of)
Michela Grand, Daniel Pollock) No. 64 C 54 (3)
and James Peake, Jr.)

MEMORANDUM OPINION

The petitioners in these causes applied for writs of habeas corpus alleging that they are unlawfully restrained of their liberty in violation of the Constitution of the United States. The pleadings show that the petitioners are in the custody of the Warden of the City Jail of the City of St. Louis pursuant to orders of commitment served upon him by the Sheriff of the City of St. Louis on October 25, 1963, issued out of the Circuit Court of the City of St. Louis, State of Missouri, Division 2, presided over by Honorable Michael J. Scott, Judge. Petitioners were convicted of contempt of Court for their alleged violations of an injunction which had issued out of the Circuit Court of the City of St. Louis on August 30, 1963, restraining certain of these petitioners as individuals and as representatives of a class known as the St. Louis Committee On Racial Equality from physically interfering with other persons' entry and transaction of business at the Jefferson Bank and Trust Company.[1] Judge Scott sentenced each to definite terms ranging from sixty days to one year and imposed fines in amounts of from $500.00 to $1000.00.

The separate causes before this Court arise out of separate alleged violations of the injunction involving different parties, occurrences and trials for criminal contempt in the Circuit Court. However, the procedure after trial and commitment is the same for each of the three groups of petitioners before this Court. The petitioners filed applications for writs of habeas corpus to the St. Louis Court of Appeals, and a writ was issued.[2] A hearing was held on the merits reviewing the facts and the law. By an opinion filed January 15, 1964, four of the petitioners in that cause were discharged, and as to the other petitioners, which included all of the petitioners before this Court, the writs were quashed. The Court reviewed the facts, not only to determine whether constitutional rights of the petitioners had been violated, but also as an appellate court determining whether the record supported a finding of guilty beyond a reasonable doubt. The remaining petitioners then filed a writ of habeas corpus in the Supreme Court of Missouri raising all of the points raised here and others. The Supreme Court of Missouri in banc filed per curiam opinions adopting the opinion of the St. Louis Court of Appeals as to all of the petitioners and denying the writs. Petitioners have not sought certiorari from the Supreme Court of the United States for review of the decision of the Supreme Court of Missouri adverse to their contentions.

On February 7, 1964, petitioners applied here for habeas relief. We issued an order upon the Warden of the City Jail to show cause on February 17, 1964, why the writ should not issue. The time was extended to February 20, 1964, and on that date a return to the order was filed and a hearing set for February 27, 1964. Petitioners' answer of February 25, 1964, to the return raised the legal issue of whether petitioners had exhaused state remedies within the meaning of the federal habeas corpus statute, 28 U.S.C.A. S.2254:

> "State custody; remedies in State Courts
> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears

> that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

It can not be doubted that prior to Fay v. Noia, 372 U.S. 391, it was the rule that exhaustion of state remedies within the meaning of the statute included seeking certiorari in the United States Supreme Court of the decision of the State's highest court denying the writ. Darr v. Burford, 339 U.S. 200. It is clear that Fay v. Noia effectively disposes of the ruling in Darr v. Burford "to the extent it may be thought to have barred a state prisoner from federal habeas relief if he had failed timely to seek certiorari in this Court from an adverse decision. Fay v. Noia, supra, at page 435. The posture of these petitioners is different. They have not failed timely to seek certiorari but rather have open to them at this moment potential relief by way of petitioning for certiorari from the adverse decision of Missouri's highest court denying them habeas relief. Thus the factual basis underlying Fay v. Noia is not present here. While the Supreme Court discusses the question of whether"remedies available in the courts of the State" includes presently available certiorari and gives a strong indication that in the future the vitality of Darr v. Burford may altogether fail and the reasons for that possibility, such discussion is dictum and so recognized therein. Fay v. Noia, supra, 435-438.

However, there is another unique feature to the instant circumstances. Under Missouri law there is no appeal, denominated as such, from a judgment of conviction for indirect criminal contempt. The opinion of the St. Louis Court of Appeals denying these petitioners relief explains that to remedy that lack of appeal, the role of the writ of habeas corpus is expanded to include want of jurisdiction in the particular case owing to the facts thereof. Thus before that Missouri appellate court the evidence was fully reviewed for a determination of whether it supported the findings of the trial judge. The St. Louis Court of Appeals opinion was relied on by the Missouri Supreme Court in denying the writ. In effect then before us is a judgment of conviction reviewed and affirmed by the State's highest court and a denial by that court of habeas relief from whith petitioners have failed to seek a potential remedy now available to them -- certiorari in the United States Supreme Court. Brown v. Allen, 344 U.S. 443, 447-450, presupposes the requirement that certiorari be sought for direct review of the state judgment before the issues with respect to certiorari on collateral relief denied by the State's highest court come into focus. See also Irvin v. Dowd, 359 U.S. 394.

The review afforded a criminal contempt conviction by habeas corpus in the Missouri appellate proceeding is much broader than that to which petitioners would be entitled in a federal district court. It appears to this Court that if petitioners were successful in obtaining certiorari in the United States Supreme Court they might be entitled to the same scope of review as was afforded them in the Missouri appellate procedures since the state writ operates as an affirmance of a criminal contempt conviction as well as a denial of the traditional habeas relief sought.

Petitioners, both at their original trial and throughout their state habeas proceedings, raised federal constitutional questions which were decided adverse to their contentions by Missouri's highest court. This court, mindful of its rung in the federal ladder and with due regard for the comity between the federal and state court systems, in its discretion, declines to exercise jurisdiction and entertain the petitioners' writ for federal habeas relief, without the opportunity having been first presented to the United States Supreme Court to grant or deny a petition for certiorari to review in effect what is both an affirmance of a final judgment of conviction and a denial of habeas relief by the Missouri Supreme Court. That remedy is still open to petitioners.

Petitioners' writ of habeas corpus will be denied.

At the time the return to the order to show cause was filed, petitioners applied for bail pending a decision on their application for a writ of habeas corpus. We considered at the time that we had jurisdiction to exercise our discretion in the matter, Johnston v. Marsh (CA 3rd) 227 F.2d 528, although we denied the bail. At the close of the hearing on February 27, 1964, after this Court had indicated that it would deny the writs of habeas corpus in each of the cases, petitioners moved for admission to bail orally and by refiling their original application. Presumably petitioners' intent was to request bail pending relief from the order denying the writs of habeas corpus in these causes. The Court has treated the refiled motion as such and has denied the same. It should be remembered that whatever effect a petition for review by certiorari to the United States Supreme Court from the adverse decision of the Missouri Supreme Court denying the writ might have, the proceeding before this district court is a civil action in habeas corpus and is not, as such, an appeal from a criminal conviction. We are not here concerned either with bail pending trial or bail pending an appeal from a conviction. Habeas corpus is not governed by rules of criminal procedure. There are no unusual circumstances shown here to set aside the usual rule that bail can not be granted to a prisoner during appeal from a denial of post-conviction remedy, such as habeas corpus or coram nobis. Edwards v. United States, (9th CA), 286 F.2d 702, Refff v. United States, (9th CA), 288 F.2d 887. See also Carbo v. United States, (9th CA), 686, l.c. 690, certiorari denied 365 U.S. 861.

The Clerk is hereby ordered and directed to enter judgment in accordance with the above findings and conclusions.

Dated this 28th day of February, 1964.

s/ ,
U.S. District Judge.

FOOTNOTES

1. The background of this controversy as set out in the St. Louis Court of Appeals opinion is substantially as follows:

On August 14, 1963, Robert Curtis wrote a letter which he signed as "Chairman of CORE" to the Jefferson Bank and Trust Company, St. Louis, Missouri. The letter advised the bank that the St. Louis Committee of Racial Equality had voted to take direct action against the bank if four full-time negroes were not hired in clerical or teller positions within two weeks. The bank replied on August 27th, advising that it was rejecting the request because it did not need four additional employees; it did not have applications from four qualified negroes; it was unwilling to discharge four present employees and hire four negroes because this would be discrimination and a violation of the Fair Employment Practices Act of the City of St. Louis. The bank urged CORE not to hold demonstrations interfering with its business operation which the bank had been informed were scheduled to start on August 30th.

On August 29th, the bank applied to the Circuit Court for a temporary restraining order. After hearing, Judge Scott issued on August 30th an order restraining certain named defendants as individuals and as representatives of a class known as the St. Louis Committee on Racial Equality from physically hindering, obstructing or interfering with other persons entering the bank's premises or transacting business in the interior of the bank. Defendants named in the restraining order were further ordered to show cause on September 26th why the temporary injunction should not issue. Some of the defendants were cited and convicted of criminal contempt for violating the restraining order on the date it was issued when one hundred or more persons entered the bank chanting, singing, locking arms, sitting down, lying down and thereby interfering with other persons' entry and transaction of business in the bank.

Again on October 4, 1963, and on October 7, 1963, the bank moved for the issuance of writs of attachment for the remaining petitioners and others alleging that notwithstanding notice of the restraining order, they had violated it by entering the bank, sitting on the floors, standing in front of the doors and thereby hindering the entrance and exit of the bank's customers. Judge Scott found that each petitioner had notice of the temporary restraining order and acted in concert and participation with and aided and abetted one or more defendants named in the restraining order and wilfully disobeyed and violated the restraining order in certain particulars. Judge Scott found that their acts and conduct sontituted offenses against the "majesty of the law and the dignity and authority of this Court" and ordered them punished "as for criminal contempt".

Footnotes - continued

2. Petitioners chose to seek habeas corpus relief in the state court rather than the alternative remedy provided by Supreme Court of Missouri Rule 27.26. Mahurin v. Nash, 321 F. 2d 662.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

Nos. 18,011, 18,032 and 18,033.

LOUIS FORD, et al., ROBERT B. CURTIS, et al.,
MICHAELA GRAND, et al.,
Appellants,
vs.
WILLIAM BOEGER, Warden,
Respondent.

Appeals from Division 2 and Division 3 of the United States
District Court for the Eastern District of Missouri,
Eastern Division.

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INDEX.

Page

Statement of the Case 1

Facts 2

Statement of Points to Be Argued and Authorities Relied on 15

Argument 21

- A. District Court erred in holding jurisdiction of state courts were not pre-empted by federal law 21
  - I. Labor dispute existed 21
  - II. Jefferson Bank engaged in commerce 25
  - III. State court's jurisdiction pre-empted by labor dispute 25
  - IV. Conduct arguably involving unfair labor practices pre-empts state court's jurisdiction 40
- B. District Court erred in holding that appellants' right to free speech and assembly were not violated 43
  - I. Convictions in Curtis et al. for allegedly advocating violation of injunction infringed rights under First Amendment 43
  - II. Injunction on its face and as applied violated rights under First and Fourteenth Amendments 50
- C. District Court erred in holding procedures used to convict appellants did not violate their constitutional rights 65
  - I. Appellants in Ford et al. were not granted reasonable time to prepare a defense 65

  - II. Appointment of Millsap and his conduct deprived appellants of right to fair trial 67
  - III. Adverse publicity instigated in part by "special prosecutor" 73

- D. District Court erred in holding convictions of appellants and sentences imposed did not violate Fourteenth Amendment rights 78
  - I. Missouri law denies jury trial in criminal contempt cases 78
  - II. Severity of sentences without jury violates Sixth and Fourteenth Amendment rights .. 80
  - III. Sentence as to James Peake constituted cruel and unusual punishment 83

- E. District Court erred in holding that certain appellants were bound by judgment in earlier litigation 84
  - I. Person must be a party or in privity with a party to be bound by injunction 84
  - II. Stranger must act in concert with a party to injunction to be in contempt 89

- F. District Court erred in holding that contractual impairment and right to specific findings were not Federally protected rights 92
  - I. Missouri courts impaired contractual obligations in violation of Fourteenth Amendment rights 92
  - II. Failure of state trial court to make specific findings violated Fourteenth Amendment .. 93

- G. District Court erred in its holding that an evidentiary hearing was not required 95

Conclusion 96

Table of Cases.

Abrams v. United States, 40 S. Ct. 17, 250 U. S. 616 .. 44
Aldna Mills, 79 NLRB 1288 41
Alemite Mfg. Corp. v. Staff, 42 F. 2d 832 ..19, 86, 87, 89, 91
Allen Bradley, Local No. 1111, United Electrical & Machine Workers of America v. Wisconsin Employment Relations Board, 62 S. Ct. 820, 315 U. S. 740 ....36, 37
Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of America v. Wisconsin Employment Relations Board, 71 S. Ct. 359, 340 U. S. 383 28
American Communication Ass'n v. Douds, 70 S. Ct. 674, 683, 339 U. S. 382 61
American Federation of Labor v. Bain, 106 P. 2d 544, 559 61
American Federation of Labor v. Swing, 61 S. Ct. 568, 312 U. S. 321 ....30, 43, 62
Apetheker v. Secretary of State, 84 S. Ct. 1659, 378 U. S. 500 ....17, 58

Bates v. Little Rock, 80 S. Ct. 412, 361 U. S. 516 61
Bell v. State of Maryland, 84 S. Ct. 1814, 378 U. S. 226 79
Berger v. United States, 55 S. Ct. 629, 295 U. S. 78 ..17, 72
Bethlehem Steel v. New York LRB, 67 S. Ct. 1026, 330 U. S. 767 ....16, 29, 37
Biff Mfg. Co., 82 NLRB 1081 41
Borg-Warner Corp., 113 NLRB 1288 41
Bridges v. California, 62 S. Ct. 190, 314 U. S. 252 ....16, 44, 45, 47, 74
Building Service Employees International v. Gazzam, 70 S. Ct. 784, 339 U. S. 532 62

Carlson v. California, 60 S. Ct. 746 43
Cooke v. United States, 45 S. Ct. 390, 267 U. S. 517 ..17, 66
Curtis v. Tozer, 374 S. W. 2d 557 ....45, 47, 49

DeJonge v. Oregon, 57 S. Ct. 255, 299 U. S. 353 47
DeMay v. Liberty Foundry Co., 37 S. W. 2d 648 79

District of Columbia v. Clawans, 57 S. Ct. 660, 300 U. S. 617 82
District of Columbia v. Colts, 51 S. Ct. 52, 282 U. S. 63 .... 18, 81
Douglas v. Alabama, 85 S. Ct. 1074 (1965) 82

Edwards v. South Carolina, 83 S. Ct. 680, 372 U. S. 229 47
Electrical Workers U. E. Local 1150, 84 NLRB 972 .. 41
Essanay Film Mfg. Co. v. Kone, 42 S. Ct. 318, 258 U. S. 358 85
Estes v. Texas, 85 S. Ct. 1628 (1965) 17, 72, 73, 74
Ex parte Fuller, 50 S. W. 2d 654 .... 20, 93
Ex parte George, 83 S. Ct. 178, 371 U. S. 72 42
Ex Parte Lennon, 17 S. Ct. 658, 166 U. S. 548 89

G...... v. Souder, Mo. App., 305 S. W. 2d 883 .... 19, 91
Garner v. Teamsters, 74 S. Ct. 161, 346 U. S. 485 .... 15, 26, 31, 37
Gibbons v. Ogden, 9 Wheaton 1 24
Giboney v. Empire Storage & Ice Co., 69 S. Ct. 684, 336 U. S. 490 .... 62, 63
Gideon v. Wainwright, 83 S. Ct. 792, 342 U. S. 335 .. 18, 82
Glasser v. United States, 62 S. Ct. 457, 315 U. S. 60 .. 67
Glenn v. Hendrix, 349 S. W. 2d 532 .... 20, 93, 94
Gompers v. Buck's Stove, 31 S. Ct. 492, 221 U. S. 418 .... 78, 91
Gorka v. Gorka, Mo., 295 S. W. 515 .... 19, 85
Green v. United States, 78 S. Ct. 632, 356 U. S. 165 .... 18, 79, 80, 82
Griffin v. California, 85 S. Ct. 1229 (1965) 71
Grosjean v. American Press Co., 56 S. Ct. 444, 297 U. S. 233 44
Guss v. Utah Labor Board, 77 S. Ct. 498, 353 U. S. 1 . 15, 35

Hamilton v. Alabama, 84 S. Ct. 982, 376 U. S. 650 33
Hansberry v. Lee, 61 S. Ct. 115, 311 U. S. 32 85
Harris v. Hardeman, 14 Howard 334 85

Hattiesburg Unions v. Broome Co., 84 S. Ct. 1156, 377 U. S. 126 42

Herndon v. Lowery, 57 S. Ct. 732, 301 U. S. 242 ..46, 47, 61

Hill v. State of Florida ex rel. Watson, 65 S. Ct. 1373, 325 U. S. 538 28

Hotel & Restaurant Employees International Alliance Local v. Wisconsin Employment Relations Board, 62 S. Ct. 706, 315 U. S. 437 62

Hughes Tool Case, 147 NLRB 166 41

Hughes v. Superior Court, 70 S. Ct. 718, 339 U. S. 460 ....23, 62, 63

In re Debs, 15 S. Ct. 901 29

In re Green, 82 S. Ct. 1114, 369 U. S. 689 ....78, 91

In re Murchison, 75 S. Ct. 623, 349 U. S. 133 ......17, 68

In re Oliver, 68 S. Ct. 499, 333 U. S. 257 ....78, 91

International Brotherhood of Teamsters v. Hanke, 70 S. Ct. 773, 339 U. S. 470 62

International Brotherhood of Teamsters v. Vogt, 77 S. Ct. 1166, 354 U. S. 284 62

Irvin v. Dowd, 81 S. Ct. 1639, 366 U. S. 717 ....17, 73

Jaben v. United States, 85 S. Ct. 1365 (1965) 66

Kasper v. Brittain, 245 F. 2d 92 45

Kilbourn v. Thompson, 103 U. S. 168 85

Local No. 438 Construction v. Curry, 83 S. Ct. 531, 371 U. S. 542 ....16, 38

Local 100, United Ass'n of Journeymen v. Borden, 83 S. Ct. 1423, 373 U. S. 690 42

Local Union No. 10, United Ass'n of Journeymen v. Graham, 73 S. Ct. 585, 347 U. S. 192 62

Local No. 207, In't Ass'n of Bridge, Etc. v. Perko, 83 S. Ct. 1429, 373 U. S. 706 42

Longshoreman and Warehousemen Local 16, 82 NLRB 650 41

Malloy v. Hogan, 84 S. Ct. 1489, 378 U. S. 1 ....17, 71

Marine Cooks & Stewards, AFL v. Panama Steamship Co., 80 S. Ct. 779, 362 U. S. 365 ....15, 23, 27
Marine Engineers Beneficial Ass'n v. Interlake Steamship Co., 82 S. Ct. 1237, 370 U. S. 173 ....16, 40
Milk Wagon Drivers Union v. Lake Valley Farm Products, 61 S. Ct. 122, 311 U. S. 91 27
Milk Wagon Drivers Union v. Meadowmoor Dairies, 61 S. Ct. 552, 312 U. S. 287 ....62, 92
Mullane v. Central Hanover Bank & Trust Co., 70 S. Ct. 652, 339 U. S. 306 85

NAACP v. Alabama, 78 S. Ct. 1163, 357 U. S. 449, 84 S. Ct. 1302 33
NAACP v. Button, 83 S. Ct. 328, 371 U. S. 415 ....16, 47, 51, 56, 59
NLRB v. Drivers, 80 S. Ct. 706, 362 U. S. 274 ...26, 29, 41
NLRB v. International Rice Milling Co., 71 S. Ct. 961, 341 U. S. 665 29
NLRB v. Local 140 Furniture Workers, 233 F. 2d 539 41
NLRB v. Northern Trust Co., 148 F. 2d 24 ....15, 25
National Maritime Union, 78 NLRB 971 41
Near v. Minnesota, 51 S. Ct. 625, 283 U. S. 697 ....44, 55
New Negro Alliance v. Sanitary Grocery Co., 58 S. Ct. 703, 303 U. S. 552 ....15, 22, 23, 24
New York Times Co. v. Sullivan, 84 S. Ct. 710, 376 U. S. 254 ....16, 47

Odom v. Langston, 213 S. W. 2d 948 ....20, 94
Osborne v. Purdome, 244 S. W. 2d 1005, 250 S. W. 2d 163 ....56, 94

Patterson v. Alabama, 55 S. Ct. 575, 294 U. S. 600 ... 79
Pennekamp v. Florida, 66 S. Ct. 1029, 328 U. S. 331 74
Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 ......19, 85
Perry Norvel Co., 80 NLRB 225 ....16, 41
Pointer v. Texas, 85 S. Ct. 1065 (1965) 82

Radio Industries, Inc., 101 NLRB 912............. 41

Radio & Television Broadcast Technicians v. Broadcast Service of Mobile, Inc., 85 S. Ct. ..., 380 U. S. 255 49

Regal Knitwear Co. v. NLRB, 65 S. Ct. 478, 324 U. S. 9 ....19, 88

Rideau v. Louisiana, 83 S. Ct. 1417, 373 U. S. 723... 73

Robinson v. California, 82 S. Ct. 1417, 370 U. S. 660 ....18, 84

Roth v. United States, 77 S. Ct. 1304, 354 U. S. 476.. 47

San Diego Building Trades Council v. Garmon, 79 S. Ct. 773, 359 U. S. 236..........16, 27, 37, 40

Schenck v. United States, 39 S. Ct. 247, 249 U. S. 47.. 43

Schneider v. State of New Jersey, 60 S. Ct. 146, 308 U. S. 147 44

Scott v. Davis, 328 S. W. 2d 394..........20, 95

Scott v. Donald, 17 S. Ct. 262, 165 U. S. 107..........88, 91

Shelly v. Kraemer, 68 S. Ct. 836, 334 U. S. 1.......... 40

Shepard v. Florida, 71 S. Ct. 541..........17, 73

Smith v. People of the State of California, 80 S. Ct. 215, 361 U. S. 147..........44, 60

Speiser v. Randall, 78 S. Ct. 1332, 357 U. S. 513 ....17, 51, 54, 57

State v. Akers, Mo., 328 S. W. 2d 31..........16, 47

State v. Gannaway, Mo., 313 S. W. 2d 653.......... 47

State v. Harmon, Mo., 243 S. W. 2d 326.......... 47

State v. Shepard, 76 S. W. 79..........18, 79

Stroble v. California, 72 S. Ct. 599, 343 U. S. 181.... 73

Stromberg v. California, 51 S. Ct. 532.......... 46

Sweezy v. State of New Hampshire, 77 S. Ct. 1203, 354 U. S. 234 61

Terminiello v. City of Chicago, 69 S. Ct. 894, 337 U. S. 1 45-46

Thomas v. Collins, 65 S. Ct. 315, 323 U. S. 516 ....17, 30, 43, 44, 54, 56

Thompson v. City of Louisville, 80 S. Ct. 624, 362 U. S. 199 ....19, 92

Thornhill v. Alabama, 60 S. Ct. 736, 310 U. S. 88 ....43, 46, 51, 60
Toledo Newspaper Company v. United States, 38 S. Ct. 560, 247 U. S. 402..........................17, 74
Townsend v. Sain, 83 S. Ct. 745, 372 U. S. 391....20, 96
Turner v. Louisiana, 85 S. Ct. 546, 379 U. S. 466 73
Tygard Sportswear Co., 77 NLRB 613.............. 41
Typographical Union, 86 NLRB 951................ 41

United Auto, A. & A. I. W. v. Wisconsin Employment Relations Board, 76 S. Ct. 794, 351 U. S. 266....36, 37
United Pharmacal Corp. v. United States, 306 F. 2d 515, 97 A. L. R. 2d 485...................19, 88, 89
United States v. Barnett, 84 S. Ct. 984, 376 U. S. 681 ....18, 79, 80, 81
United States v. Cruikshak, 92 U. S. 542..........78, 91
United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96 ....19, 91
United States v. Hutcheson, 61 S. Ct. 463, 312 U. S. 219 27
United States v. United Mine Workers of America, 67 S. Ct. 677, 330 U. S. 258..................... 88

Weber v. Anheuser Busch, Inc., 75 S. Ct. 480, 348 U. S. 468 ....15, 24, 28, 37, 38, 39
Webster v. Reid, 11 Howard 437................. 85
Whitney v. California, 47 S. Ct. 641, 274 U. S. 357..44, 45
Wieman v. Updegraff, 73 S. Ct. 215, 344 U. S. 183.. 61
Wood v. Georgia, 82 S. Ct. 1364, 370 U. S. 375 ....16, 44, 46, 49

Youngdahl v. Rainfair, Inc., 78 S. Ct. 206, 355 U. S. 131 ....36, 37, 39

Federal Statutes, State Statutes and Court Rules Cited.

Title 29 U. S. C. 104 (13) 22, 28
Title 29 U. S. C. 152 (6) (7) 25

Title 29 U. S. C. 152 (9) 21
Title 29 U. S. C. 160 31
Title 29 U. S. C. 164 (c) (1) 36
R. S. Mo., 1959, Sec. 476.120 79
R. S. Mo., 1959, Sec. 526.050 35
R. S. Mo. 492.450 71
R. S. Mo. 492.460 71
R. S. Mo. 492.480 71
R. S. Mo., 1959, Sec. 473.310 94
R. S. Mo., 1959, Sec. 476.010 94
R. S. Mo., 1959, Sec. 476.140 ....93, 94
R. S. Mo., 1959, Sec. 526.070 ....92, 93
Mo. Sup. Ct. Rule 4.20 68
Mo. Sup. Ct. Rule 35.01 93

Other Authorities Cited.

12 Am. Jur. 2d 326, p. 495 ....20, 93
33 Am. Law Register & Review 882 a Protest Against Administering Criminal Law by Injunction........ 26
42 Am. Jur. 11, p. 243 68
13 Law Quarterly Review 347 Government by Injunction 34
Report of the Warren Commission 77
33 Rocky Mountain Law Review 1, 2, 3 The Public Trial & Free Press, William O. Douglas 74
Speech 3-11-65, Peter C. Robertson, Executive Director Mo. Comm. on Human Rights 64
The Labor Injunction, Frankfurter and Greene 25, 53
The Other America, Michael Harrington 40

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

Nos. 18,011, 18,032 and 18,033.

LOUIS FORD, et al., ROBERT B. CURTIS, et al.,
MICHAELA GRAND, et al.,
Appellants,

vs.

WILLIAM BOEGER, Warden,
Respondent.

Appeals from Division 2 and Division 3 of the United States
District Court for the Eastern District of Missouri,
Eastern Division.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASE.

The cases before this Court are: Louis Ford et al., Appellants, v. William Boeger, Respondent (No. 18,011); Robert B. Curtis et al., Appellants, v. William Boeger, Respondent (No. 18,032); Michaela Grand et al., Appellants, v. William Boeger, Respondent (No. 18,033). These are companion cases, all being appeals from denials of applications for writs of habeas corpus arising out of the detention of appellants after conviction of charges of contempt in the Circuit Court of the City of St. Louis, Missouri.

Ford et al. was decided by Division 2 and Curtis et al. and Grand et al., were decided by Division 3 of the United States District Court for the Eastern District of Missouri, Eastern Division, St. Louis, Missouri. Ford et al. was decided by the Honorable James H. Meredith; Curtis et al. and Grand et al. were decided by the Honorable John K. Regan, Judges for Divisions 2 and 3 respectively of the United States District Court for the Eastern District of Missouri, Eastern Division.

FACTS.

The St. Louis Committee of Racial Equality, commonly referred to as CORE, is a branch of the national organization known as the Congress of Racial Equality. St. Louis CORE has sought to alleviate racial discrimination in public accommodations, housing, government and employment. In the past fifteen years CORE has negotiated with all types of business enterprises in order to secure jobs and upgrading for Negroes.

In 1961 St. Louis CORE set up a special committee for the purpose of negotiating with banks in the City of St. Louis. Most bank jobs call for only a high school education. The then current statistics showed, however, that out of 5,000 persons working in clerical or teller positions in St. Louis banks only 35 were Negroes. These figures were interpreted by CORE as reflecting a general pattern of discrimination against Negroes in the banking industry. Figures current and on hand as of June, 1963, indicated that Negroes represented about 30% of the population of St. Louis and also that the unemployment figures for Negroes in St. Louis were 2½ times as high as for white persons. It is against this backdrop that the campaign for jobs and fair employment at the Jefferson Bank & Trust Company began.

The Jefferson Bank is a federally insured bank engaged in substantial interstate commerce and is the chief depository of funds for the Board of Education and the City of St. Louis. It is located near an all Negro neighborhood and ten years before the present controversy, this bank employed ten Negroes in clerical positions. With a change in ownership and administration these Negroes were replaced with whites. In August of 1963, Jefferson Bank had 62 employees, two being Negroes, one a messenger and the other working in a clerical position. No Negroes had been hired by the bank in the past seven years and the bank had refused to accept employment applications from Negroes. No progress had been made at the Jefferson Bank since 1961, and on August 14th, 1964, CORE sent a letter to the Jefferson Bank asking that the bank hire four Negroes in teller or clerical positions within two weeks (Tr. C, 10, 11). The bank replied with a written communication denying the request (Tr. C, 17, 18). Later, St. Louis CORE sent a committee to the bank for a conference urging the bank to act favorably on the request for the employment of Negroes or to consider alternative plans of hiring Negroes as employees were replaced because of normal turnover (Tr. C, 20-24). During August, September and October, 1963, the bank hired five new persons, no one of whom was a Negro.

On Sunday, August 25, 1963, the matter was discussed at a regular meeting of St. Louis CORE and the group voted to take direct action against the bank if the request was not complied with. The time set for the demonstration was from 4:00 p. m. to 6:00 p. m. on Friday, August 30, 1963 (Tr. C, 663).

On Thursday, August 29, 1963, the Jefferson Bank and Trust Co. filed its petition for an injunction in the Circuit Court of the City of St. Louis, Michael J. Scott, Judge, and applied for a temporary restraining order. Judge Scott notified Attorney Charles R. Oldham of the application and after a conference with Judge Scott, Oldham entered his appearance as an individual. Oldham appeared at a strategy meeting of CORE that Thursday night, and informed the group that Jefferson Bank had filed a petition for an injunction and was seeking a temporary restraining order. He told the group that the order had not been issued. However, he advised that if a temporary restraining order was issued, he would urge the committee to abide by it (Tr. C, 514). The Committee then voted to take direct action at the bank by picketing and then by a separate motion, by a count of 18 to 13, voted that individuals could make their own decision as to whether they would risk arrest by standing at the front door of the bank (Tr. C, 743). The appellants in Curtis et al., who were present at the meeting, voted and spoke against standing at the front door of the bank. There was no discussion of going inside the bank at either the meeting on August 25, or on August 29, or at the gathering on the Guth parking lot, mentioned *infra* (Tr. C, 1452).

Judge Scott issued an ex parte restraining order at 1:55 p. m. on Friday, August 30th, 1963. Some, but not all, of the appellants were represented in court by Attorney Raymond Howard. A hearing on the petition for injunction was to be held 28 days later on September 26, 1963. The persons named in the restraining order were Robert B. Curtis, William L. Clay, Lucian Richards, Rev. Charles Perkins, Norman R. Seay, all of whom are appellants herein. Also named were Charles R. Oldham, Marian Oldham, Herman Thompson, Walter Hayes, and Richard Daly, individually and as representatives of a class known as the St. Louis Committee of Racial Equality.

The restraining order enjoined the above individuals from engaging "in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees in the performance of their duties or other persons in the conduct of their business with plaintiff or which in any way interferes with the proper and normal conduct of plaintiff's banking business.'"[1]

At about 4 p. m. on the afternoon of August 30, 1963, petitioners and other pickets appeared at the bank and engaged in peaceful picketing until about 5:15 p. m., at which time a number of pickets stood first in front of the front bank door, and then the rear door. Access to the bank through one or the other of these doors was entirely unobstructed throughout the course of the demonstration. While several persons were standing in front of the bank door, sheriff's deputies pushed several of them, including three small children, to the ground. Immediately after this act of violence by officers of the State some of the pickets surged into the bank, sang freedom songs and sat on the floor of the bank. The pickets entered at 5:30 p. m. and left the bank at 6:00 p. m., the usual closing time. Between 5 and 6:00 p. m. Sheriff's deputies served copies of the restraining order on 7 of the persons named in the injunction; 11 John Doe copies were served on unknown persons.

It is important to note that this demonstration occurred two days after the March on Washington, when racial feeling and expectation in the Negro Community was at its highest point; that only 30 of the more than 150 pickets were members of CORE; that none of the appellants in Curtis et al. stood in front of the bank door, and only two of them entered the bank; that the demonstrations at the bank on August 30, October 4, and 7 were peaceful and non violent insofar as the participants were concerned; in fact, not a single charge of violent conduct has been made against any member of CORE. The only violence that occurred was perpetrated by sheriff's deputies of the City of St. Louis (Tr. C, 1503-1504). In addition, no arrests were made, and no request for the arrest of any person was made by any bank representative on August 30, 1963 (Tr. C, 411).

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[1] See Exhibit P-4 attached to application for writ of habeas corpus, Curtis et al.

During the course of the demonstration, an attorney for the St. Louis Police Department, several police officers and Wayne Millsap, the attorney for the Bank, went to Judge Scott's home to get an order to attach persons who were reported to be in violation of the restraining order (Tr. 335, 347, 348). This request was withdrawn when it was learned that all pickets had peaceably left the bank.

On Saturday, the day following the demonstration, the Governor of Missouri, John Dalton, Mayor Raymond Tucker, and both St. Louis daily newspapers attacked the demonstration. Governor Dalton indicated that he would meet with the Board of Police Commissioners and other local officials to see what could be done about the alleged acts of "lawlessness". A high level meeting was held in the Board room of the Police Commissioners on Saturday (Tr. C, 406, 419).

Later, on Saturday night, Judge Scott, issued attachment orders for eight persons named in the restraining order plus Raymond Howard, an attorney who had represented several of the defendants in the injunction suit the day previous. The Judge set bail at $10,000 each, and ordered the Sheriff to immediately take into custody the persons named in the attachment order, which was issued at 9 p. m. on Saturday night. Mrs. Oldham, and Herman Thompson, teachers in the public schools, were taken into custody between 10:30 p. m. Saturday and 1:30 a. m. Sunday morning. Since they were not able to raise the necessary $20,000 bail, both were forced to spend the night in the City Jail. On Sunday, September 1, the other seven persons voluntarily surrendered themselves into the custody of the Sheriff. Four persons posted bail, but Robert B. Curtis, Charles R. Oldham, Lucian Richards, Rev.

Charles Perkins and Norman Seay remained in jail in lieu of $50,000 bail.

At 10:00 a. m. Tuesday the 3rd of September, all nine defendants appeared in court. On opening the court session Judge Scott ordered the trial to commence. One of the defense attorneys moved that the defendants be informed of the charges against them; the motion was overruled. The five defendants in custody had not had opportunity to confer with counsel prior to this time. Defense attorneys again asked to be informed of the specific charges against the defendants. This request was overruled whereupon defense attorneys asked the Court for time to prepare a defense even though they did not know specifically what the charges were. This motion was overruled. Defense attorneys then read to Judge Scott the statute relating to contempt of court which stated that the accused is entitled to "reasonable time to prepare a defense". The Judge then granted the defense 30 minutes to prepare for trial and to confer with the defendants. After the conference another motion was made for a continuance, this motion was overruled and Judge Scott advised the bank attorney to begin presenting evidence. Attorneys for defendants then asked for time to file a writ of prohibition; they were given until 10:00 a. m. the next day for this purpose (Tr. C, 14-21; 9-3-63).

When Court convened on September 4th, Judge Scott announced that he was ready to proceed with the trial. Defense Attorneys again requested a continuance and the court granted five days to prepare the case.

On Saturday, September 7, defendants were required to give their depositions at the request of Wayne Millsap, the bank's attorney. These depositions were given under pleadings charging civil contempt. Not until September 19th and after depositions had been taken, did defendants receive official notice that the charges against them were for criminal contempt. Furthermore, on September 18, 1963, Millsap was appointed "special prosecutor", even though, as the son-in-law of the bank's president (Bank Director) and as attorney for the bank, he had a financial stake in the outcome of the case. Prior to September 18 he was acting as attorney for the Bank in a civil contempt proceeding.

In the meantime, defendants, having given their depositions on September 7, and still laboring under the impression that this was to be a trial for civil contempt, had sent interrogatories to the plaintiff bank. Answers to these interrogatories listed more than 100 persons as ''possible'' witnesses for the plaintiff. Defendants were then granted a continuance.

The trial began on September 23, and ended October 3. During the trial it appeared that Millsap had talked to a 16 year old girl who was a CORE member and had participated in the demonstration on August 30. The bank attorney offered to protect her and her brother from criminal prosecution if she would cooperate with him and give a voluntary statement. A motion was made that another attorney be appointed as special prosecutor which was denied (Tr. C, 722-734). The trial concluded on October 3, 1963, and the defendants were instructed to return on October 24, 1963, to receive the judgment of the Court.

On Friday, October 4, 1963, at about 5:00 p. m., some 15 persons were arrested at the Jefferson Bank and Trust Company by the St. Louis Police on trespassing and disturbing the peace charges. They were held at the police station without opportunity to see counsel. Then, pursuant to a writ of attachment, they were taken before Judge Scott for a hearing on charges of contempt for violating the injunction previously issued by the court.

These individuals are appellants in the case of Ford et al. A hearing was commenced that night about 9 p. m., which lasted until 3 a. m. the morning of the 5th of October, and then recessed until Monday morning, October 7th.

On Monday morning appellants objected to proceeding to trial on the ground that no citation had been filed or charges made against these petitioners, and hence they did not know what to defend against. They were overruled. The attorney for the plaintiff bank stated in open court that appellants were being tried in a civil proceeding. The court failed to advise appellants, despite repeated requests, of the nature of the proceedings and the specific charges against them.[2] During the course of the trial in the case of Ford et al. the Judge was informed that some of the appellants were minors and he appointed guardian ad litems to represent these appellants. None of the appellants were members of CORE, and none were named in the original injunction suit. No special prosecutor was ever named in this proceeding.

On October 8th, while the second trial was in progress, an Illinois warrant was sworn out for the arrest of Taylor

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[2] (Tr. F, 6)
"Mr. Witherspoon: I would like to see or have a copy of the citation. I looked in the Court File and I failed to find a citation issued by this Court setting forth the day and time and place and the charges against these defendants. I saw the attachment, but it stated no date as to when these defendants committed an offense in any way, and there were no charges in there that they had committed an offense * * *

(Tr. F, 9, 10)
Mr. Millsap: * * * in the proceeding against the nine other individuals, * * * we clearly proceeded as a matter of criminal contempt * * * with reference to these defendants * * * we have not taken this course * * *

(Tr. F, 14, 15)
Mr. Millsap: * * * in view of the statements which have just been made by Mr. Witherspoon * * * I am prepared to proceed, if Your Honor should have any desire to proceed in that manner, for criminal contempt. I have all the papers here with reference to anything in connection with the criminal contempt charges against these individuals, Your Honor.
Mr. Witherspoon: If he has them in his briefcase, Your Honor, we think he ought to file them. * * *
The Court: All right, gentlemen. Motion will be overruled.
Mr. Witherspoon: I would like to know which way he's going to proceed now.
Mr. Millsap: The record speaks for itself."

Jones, one of the defendants. The warrant was issued in East St. Louis, Illinois on charges of deceptive practices arising out of failure to pay rental due on a TV set. Taylor Jones was arrested in East St. Louis early Friday morning, October 11th, and was not permitted to make bond until 10:30 a. m. that same day. When he did not appear in the Court of St. Louis at 10:00 a. m., his $5,000 bond was forfeited and his arrest was ordered forthwith by Judge Scott (Tr. F, 621). About 11:00 o'clock Taylor Jones appeared in Court in St. Louis, and his presence was announced to the court. A motion was made to set aside the bond forfeiture on payment of cost. The court refused to rule on the motion and recessed until 3:00 p. m. ordering all parties to reappear at that time (Tr. F, 656). During the noon recess Jones was arrested by the sheriff, and Judge Scott increased his bond to $10,000 dollars. Due to his inability to make bond, he was returned to jail. That afternoon, the court refused to set aside the bond forfeiture (Tr. F, 658) because Jones "did not voluntarily surrender himself to the court". (About 10 days later, the court did set aside the forfeiture. Because of the forfeiture, however, Jones was unable to get the required bond of $10,000.) The trial of the second group was concluded on Friday the 11th day of October and they were ordered to appear on October 25 to receive the judgment of the court.

On Monday, October 7, 1963, the plaintiff bank made elaborate preparations and plans for handling demonstrations. Such plans consisted in part of stationing a bank employee at each door of the bank to admit only selected persons with whom the bank wished to do business, and of setting up a special facility at teller's window 10 for making change at a service charge of twenty-five cents per transaction. Appellants in Grand et al. were admitted to the Bank on the afternoon of October 7, 1963, by the bank employees or guards posted at the doors. When appellants did not leave at the request of the bank representatives, they were arrested and charged with peace disturbance and trespass. These appellants were not members of CORE, nor were they parties to the injunction suit or named in the restraining order. While these appellants were in the custody of the police on the night of October 7, 1963, Earle J. Niederluecke entered his appearance as attorney for the bank and filed his verified motion of the issuance of an attachment against them. The verification of said motion was sworn to **three days before** the facts stated therein were alleged to have occurred. Said motion was granted[3] and the Sheriff attached the bodies of appellants and produced them in Court on October 7, 1963. On the evening of their arrest they were brought before the court and ordered to plead to the charges alleged in the attachment order. Upon entering pleas of not guilty, the trial court set October 10th as the date on which appellants were to be tried. On the morning of the 10th, the trial was continued to October 14th, 1963. On October 14th, attorneys for appellants announced that they were not ready for trial and filed motions for a continuance, and to use discovery procedures. All of said motions were overruled. The trial was concluded on October 16. Wayne Millsap was appointed special prosecutor and the court refused to permit the appellants to inquire into the special interest, if any, of the other special prosecutor, John Montrey (Tr. G, 21).

On October 24 and 25th, the Court found all 19 persons guilty of criminal contempt and they received fines from $500.00 to $1,000.00 and sentences in the City Jail from 60 days to one year.

James Peake, one of the appellants herein, is a paraplegic. He was fined $500.00 and sentenced to one year in the city jail. He has served 55 days. The jail cells are 4 feet by 8 feet and his wheel chair had to be left in the "bull pen" area as it would not fit into the cell. He required help to use the toilet facilities and to get in and out of bed. He had to be carried from his bed to his wheel chair in the "bull pen". He was totally dependent upon other prisoners for these services.

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[3] See exhibit P-8 attached to application for writ of habeas corpus Grand et al.

After the terms and fines were assessed, Judge Scott refused to allow the defendants to make bond pending the filing of an appeal. He further refused to grant any of the defendants time to put their affairs in order before beginning their sentences.

A writ of habeas corpus was requested from the Court of Appeals on October 24, 1963 and a motion was made to set bond pending the filing of an appeal. This was refused on the grounds that no appeal is permitted from a commitment of criminal contempt.

A second Writ of Habeas Corpus was filed on behalf of the entire group of 19 on October 29th and on November 1st they were admitted to bail by the St. Louis Court of Appeals. The second Writ of Habeas Corpus alleged lack of due process, other unlawful procedures, and the lack of guilt.

On the 15th day of January, 1964, the St. Louis Court of Appeals discharged Charles and Marian Oldham, Raymond Howard and Herman Thompson. The writs of habeas corpus were quashed as to the remaining 15 and they were returned to jail to complete their sentences. Request for bail was made and denied. All appellants subsequently filed an application for writ of habeas corpus in the Supreme Court of Missouri which was denied by said court without a hearing.

On February 7, 1964, appellants filed an application for writ of habeas corpus in the United States District

Court of Missouri, Eastern Division. On February 11, 1964, William Boeger, Warden, was directed to show cause on February 17, why such a writ should not issue. On February 14, Respondent was granted until February 20 to file his answer to show cause order and on February 20 further hearing was scheduled for February 27, 1964. The applications for writs of habeas corpus were denied on the grounds the appellants had not exhausted all remedies available to them in the State courts. Appellants appealed to the Eighth Circuit Court of Appeals and the Eighth Circuit determined the appellants had exhausted their state remedies and ordered the district court to consider whether the issues sought to be raised required an evidentiary hearing. Appellants were admitted to bail pending judgment on the applications for writ of habeas corpus.

A pre-trial conference was held in the case of Ford et al., where appellants requested an opportunity to present additional evidence on the issues of (a) extent and existence of a labor dispute involving unfair labor practices, (b) the extent of bias, prejudice and interest of Millsap and the other special prosecutor appointed in the case of Grand et al., (c) the acts of discrimination practiced by Jefferson Bank in the hiring and promotion of Negroes.

The applications for writ of habeas corpus contend appellants' restraint was in violation of certain Federally protected constitutional rights in that (a) the Circuit Court of the City of St. Louis did not have jurisdiction of the subject matter because of its authority was preempted by virtue of a labor dispute involving unfair labor practices, (b) the injunction and subsequent convictions constituted a denial of rights protected under the First amendment of the Federal Constitution, (c) the terms of the injunction and the procedures used at the hearing deprived appellants of rights guaranteed by the Federal Constitution in that: (1) appellants in Ford et al. were not allowed a reasonable time to prepare a defense, (2) the appointment and use of an interested and biased party as "special prosecutor" denied appellants of their right to a fair trial, (3) appellants were denied a right to a fair trial because of the activities of the "special prosecutor", (4) appellants in Ford et al. were never informed of the nature of the proceedings and the charges against them, (5) the Court failed to make specific findings of the acts determined to be in violation of the injunction, (d) the fines and sentences were excessive and constituted a denial of due process under the 14th amendment and cruel and unusual punishment, (e) the conviction of appellants in Ford et al. and Grand et al. of contempt when they were not parties, nor covered by the jurisdictional bond, nor charged with acting in concert with parties constituted a denial of due process, (f) the trial court construed the jurisdictional indemnity bond so as to impair contractual obligations directly affecting appellants, and (g) the Supreme Court of Missouri failed to resolve a conflict or opinion between State Appellate Courts of equal jurisdiction.

The respondent in his return to the order to show cause admitted the detention of the appellants and generally contended that no substantial constitutional issues were raised by the pleadings.

On remand the District Court made a determination, without affording any opportunity to appellants' counsel to appear before it and be heard, that an evidentiary hearing was not required, that the authority of the state court was not pre-empted because of the labor dispute, that the hearing did not deprive the appellants of due process and that the other constitutional issues raised were not federally protected rights. Thereafter an application for certificate of probable cause was granted by the District Court and an appeal perfected to this Court.

STATEMENT OF POINTS TO BE ARGUED AND AUTHORITIES RELIED ON.

A.

The District Court erred in holding that the jurisdiction of the Circuit Court of the City of St. Louis was not preempted by virtue of the Norris-LaGuardia Act and the National Labor Relations Act as amended herein called the Act.

I.

The controversy between CORE and Jefferson Bank involved a labor dispute within the meaning of the Act.

New Negro Alliance v. Sanitary Grocery Co., 58 S. Ct. 703;

Marine Cooks and Stewards AFL v. Panama Steamship Co., 80 S. Ct. 779;

Weber v. Anheuser-Busch, Inc., 75 S. Ct. 480.

II.

Jefferson Bank and Trust Company is a Missouri corporation engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

NLRB v. Northern Trust Co., 148 F. 2d 24.

III.

Jurisdiction over a labor dispute affecting interstate commerce and involving unfair labor practices is preempted by the National Labor Relations Board.

Garner v. Teamsters, 74 S. Ct. 161;

Guss v. Utah Labor Board, 77 S. Ct. 498;

Bethlehem Steel Co. v. New York Labor Relations Board, 67 S. Ct. 1026;

Local No. 438 Construction v. Curry, 83 S. Ct. 531.

IV.

The State Court is without jurisdiction to enjoin conduct which is arguably subject to the protection against unfair labor practices under Sections 7 and 8 of the Act.

San Diego Building Trades Council v. Garmon, 79 S. Ct. 773;

Perry Norvell Co., 80 NLRB 225;

Marine Engineers Beneficial Ass'n v. Interlakes Steamship Co., 82 S. Ct. 1237.

B.

The District Court erred in holding that the Circuit Court of St. Louis, by issuing its injunction and by convicting appellants of contempt for exercising their right of free speech, did not violate their rights under the First and Fourteenth Amendments.

I.

The conviction of appellants in Curtis et al. for allegedly advocating violation of the injunction infringed appellants' rights to free speech and assembly.

Bridges v. State of California, 62 S. Ct. 190;

State v. Akers, Mo., 328 S. W. 2d 31;

New York Times v. Sullivan, 84 S. Ct. 710;

Wood v. Georgia, 82 S. Ct. 1364.

II.

The injunction on its face and as applied violated appellants' rights under the First and Fourteenth Amendments.

NAACP v. Button, 83 S. Ct. 328;

Speiser v. Randall, 78 S. Ct. 1332;
Aptheker v. Secretary of State, 84 S. Ct. 1654;
Thomas v. Collins, 65 S. Ct. 315.

C.

The District Court erred in holding that the terms of the injunction and the procedures used to convict appellants did not deprive them of rights guaranteed by the Fifth, Sixth and Fourteenth Amendments.

I.

Appellants in Ford et al. were not allowed a reasonable time to prepare for trial.

Cooke v. United States, 45 S. Ct. 390.

II.

The appointment of Wayne Millsap as "special prosecutor" and his conduct before, during and after the trials deprived appellants in Curtis et al. of their rights under the Fifth Amendment and all appellants of their right to a fair and impartial trial.

Malloy v. Hogan, 84 S. Ct. 1489;
In re Murchison, 75 S. Ct. 623;
Berger v. United States, 55 S. Ct. 629.

III.

Appellants were denied their rights to a fair trial because of adverse publicity instigated in part by the "special prosecutor."

Estes v. Texas, 85 S. Ct. 1628 (June, 1965);
Irvin v. Dowd, 81 S. Ct. 1639;
Shepherd v. Florida, 71 S. Ct. 541;
Toledo Newspaper Co. v. United States, 38 S. Ct. 560.

IV.

Appellants in Ford et al. were never informed of the nature of the charges against them and this failure constituted a denial of due process under the Fourteenth Amendment.

D.

The District Court erred in holding that the conviction of appellants and sentences imposed without jury trial was not a denial of due process under the Sixth, Fourteenth and Eighth Amendments.

I.

Missouri law denies a jury trial to persons accused of criminal contempt and appellants have not waived their right to assert their claim here.

State v. Shepherd (Mo.), 76 S. W. 79;
Green v. United States, 78 S. Ct. 632.

II.

The severity of sentences that were imposed or could have been imposed under Missouri law required that petitioners be granted a jury trial pursuant to the Sixth and Fourteenth Amendments.

United States v. Barnett, 84 S. Ct. 984;
District of Columbia v. Colts, 51 S. Ct. 52;
Gideon v. Wainright, 83 S. Ct. 792.

III.

The fine and jail sentence assessed against James Peake constituted cruel and unusual punishment in violation of the Eighth Amendment.

Robinson v. California, 82 S. Ct. 1417.

E.

The District Court erred in holding that appellants in Ford et al. and Grand et al. were bound by a judgment rendered in earlier litigation to which they were not parties, privies or members of a class.

I.

A person must be a party or in privity with a party in order to be bound by an injunction or any other judgment in personam.

Pennoyer v. Neff, 95 U. S. 714;
Gorka v. Gorka (Mo.), 295 S. W. 515;
Alemite Mfg. Corp. v. Staff, 42 F. 2d 832;
Regal Knitwear Co. v. NLRB, 65 S. Ct. 478.

II.

A stranger cannot be adjudged in contempt of court for violation of an injunction unless he acts in concert with a person who is a party to the injunction.

United Pharmacal Corp. v. United States, 306 F. 2d 515;
G........ v. Souder (Mo. App.), 305 S. W. 2d 883;
United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96;
Thompson v. City of Louisville, 80 S. Ct. 624.

F.

The District Court erred in its holding that impairment of contractual obligations and the right to specific findings by the trial court were not rights protected by the Federal Constitution.

I.

The Missouri courts construed the jurisdiction indemnity bond so as to impair contractual obligations directly

affecting these appellants in violation of Fourteenth Amendment rights.

12 Am. Jur. 2d 326, p. 495 (Bonds).

II.

The law requiring specific findings of the acts determined by the trial court to be contemptuous was discriminately applied and enforced against these appellants in violation of Fourteenth Amendment rights.

Ex parte Fuller (Mo.), 50 S. W. 2d 654;
Odom v. Langston (Mo.), 213 S. W. 2d 948;
Glenn v. Hendrix (Mo.), 349 S. W. 2d 532;
Scott v. Davis (Mo.), 328 S. W. 2d 394.

G.

The District Court erred in its holding that an evidentiary hearing was not required.

Townsend v. Sain, 83 S. Ct. 745.

ARGUMENT.

A.

The District Court erred in holding that the jurisdiction of the Circuit Court of the City of St. Louis was not preempted by virtue of the Norris-LaGuardia Act and the National Labor Relations Act as amended, herein called the Act.

I.

The controversy between CORE and Jefferson Bank involved a labor dispute within the meaning of the Act.

A Labor Dispute has developed between the St. Louis Committee of Racial Equality and the Jefferson Bank and Trust Company. CORE, after a long period of negotiation, made a demand on the bank that they employ four Negroes in clerical or teller positions. The bank refused the request thereby creating a labor dispute. It is well settled that a controversy arising over the hiring of Negroes where racial discrimination is alleged, is considered a labor dispute within the meaning of the Act.

The Act, Title 29 U. S. C. A. 152 (9), defines a labor dispute as follows:

> The term includes any controversy concerning terms, tenure or conditions of employment, concerning the association or representation of persons in negotiating, fixing, maintaining, changing or **seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.** (Emphasis supplied.)

The above definition which is identical to the definition of labor dispute contained in the Norris-LaGuardia Act, 29 U. S. C. A. 104 (13), has been held by the Supreme Court in **New Negro Alliance v. Sanitary Grocery Co.,** 58 S. Ct. 703, to apply to a situation where an association of colored persons attempted to secure employment of Negroes as clerks at a retail grocery store. In voiding the injunction the Court said in the **New Negro Alliance Case,** supra, at pages 706, 707:

> "In quoting the clauses of section 13 we have omitted those that deal with disputes between associations of persons engaged in a particular trade or craft and employers in the same industry. It is to be noted however that the inclusion in the definition of such disputes and the persons interested in them, serves to emphasize the fact that the quoted portions were intended to embrace **controversies other than those between employers and employees; between labor unions seeking to represent employer and employees; and between persons seeking employment and employers."**
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> "**The Act does not concern itself with the background or the motives of the dispute.** The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion and the removal of discrimination against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purpose or the express terms of the act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of

> employment based upon differences of race or color." (Emphasis supplied.)

The U. S. Supreme Court has as recently as 1960 affirmed the validity of a broad interpretation of the term labor dispute in **Marine Cooks and Stewards A. F. L. v. Panama Steamship Co.**, 80 S. Ct. 779 where the Court stated at page 783:

> "The Act's language is broad because Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris La Guardia Act. The history and background that led Congress to take this view have been adverted to in a number of prior opinions of this court in which we refused to give the Act narrow interpretation that would have restored many labor disputes controversies to the courts.[7]"

In footnote number 7 of the opinion, the **New Negro Alliance Case** is cited in support of a broad interpretation of the term labor dispute. Thus, it can readily be seen that the current and prevailing view is that a labor dispute exists when a controversy develops over the hiring of Negroes at a particular business institution.

The 1950 case of **Hughes v. Superior Court of California,** 339 U. S. 460; 70 S. Ct. 718, where the United States Supreme Court upheld contempt convictions and an injunction against picketing in a similar case where Negroes were seeking jobs, is not applicable to the instant case, because in **Hughes,** supra, there was no assertion that state court jurisdiction had been preempted by Federal Laws. The defense based its case on 1st amendment rights and the due process clause of the 14th amendment to the U. S. Constitution. The Supreme Court decided this case on the basis of a state's right to fix its own public policy. However, mere assertion by a legislature that the police power of the state is being exercised or that the public policy of the state is being formulated does not permit a state to encroach upon federal jurisdiction properly asserted by Congress. This doctrine has been clear since 1824 when **Gibbons v. Ogden,** 9 Wheaton 1 was handed down by the Supreme Court. See also **Weber v. Anheuser Busch Inc.,** 75 S. Ct. 480.

Moreover when the **Hughes Case** was heard in the state supreme court, it was held that under the facts there was no labor dispute, but a social dispute, even though the purpose of the pickets, was to improve the wage and working conditions of the Negroes in that particular locality. However, the logic of that position breaks down unless one would hold that a labor dispute comes into being only when Caucasians are involved and under like circumstances becomes a social dispute when Negro workers come into conflict with management.

Another important factor with regard to the term "labor dispute" is that its existence does not depend on the background or motives of the controversy, **New Negro Alliance v. Sanitary Grocery Co.**, supra, nor is the method of labor combat a relevant factor in determining whether or not a labor dispute exists. Thus the cases before the National Labor Relations Board contain numerous instances of strikes and lockouts, peaceful and violent picketing, illegal and legal coercion, and other methods of combat practiced by both employers and labor organizations. However, the motive of the parties and the methods employed by both sides are extremely important when one is trying to ascertain whether or not an unfair labor practice is being committed. In the course of a labor controversy it is not at all unusual for both sides to accuse the other of illegal tactics, but a labor dispute may exist whether or not either or both parties to the dispute has been guilty of wrongful conduct.

II.

Jefferson Bank and Trust Company is a Missouri Corporation engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

It is well settled that a banking institution involved in substantial interstate commerce, comes within the contemplation of the Act and is subject to the jurisdiction of the National Labor Relations Board. Jefferson Bank and Trust Company is situated directly across the Mississippi River from Illinois. It is the repository for funds of the St. Louis Land Clearance for Redevelopment Agency, negotiates FHA and GI loans, is federally insured by the Federal Deposit Insurance Corporation and has numerous interstate depositors and customers. In the case of **NLRB v. Northern Trust Company,** 148 F. 2d 24, the court upheld federal jurisdictions over a labor dispute in a bank engaged in interstate commerce.

III.

Jurisdiction over a labor dispute affecting interstate commerce and involving unfair labor practices is preempted by the National Labor Relations Board.

The legislative history of the National Labor Relations Act, 1935, indicates a desire on the part of Congress to protect labor from certain abuses that inhibited its growth.

The evils of the labor injunction are amply pointed out in **The Labor Injunction** by Frankfurter and Greene where the authors state on page 81:

> "That the injunction includes more than the lawless that it leaves the lawless undefined and thus terrorizes innocent conduct; that it employs the most powerful resources of the law on one side of a bitter social struggle."

It can readily be seen that the above statement is equally true when it is applied to the civil rights struggle in America today. What has already transpired is primarily a struggle of white labor for a better life; but now Negro working men are seeking equal employment and upgrading through virtually the same processes that labor unions use and under even more oppressive handicaps:[1]

Against this background it is obvious that Congress intended in the Norris La Guardia Act of 1932 and the National Labor Relations Act of 1935, to protect the working man from the oppressive use of injunctions. In addition Congress wished to protect the right of employees to strike, **NLRB v. Drivers**, 80 S. Ct. 706.

In the instant case the state court has intervened in a labor dispute involving unfair labor practices concerning the employment of Negroes. The court without hearing or making findings of fact issued an ex parte injunction against members of CORE. They were alleged to have violated the injunction and later sentenced to long jail terms. This controversy was not referred to the NLRB; Jefferson Bank was not required to show that NLRB jurisdiction did not obtain, nor was the federal labor policy limiting the usage of injunctions adhered to by the state court.

The U. S. Supreme Court has repeatedly held the congressional purpose of the National Labor Relations Act was, among other things, to create uniformity of labor policy and centralized administration throughout the United States. This position is ably stated in **Garner v. Teamsters**, 74 S. Ct. 161, where the court said at page 166:

> "Congress evidently considered that centralized administration of specifically designed **procedures** was

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[1] **A Protest Against Administering Criminal Law by Injunction, 33 Am. Law Register and Review 882.**

necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local **procedures** and attitudes toward labor controversies. **A multiplicity of tribunals and a diversity of procedures are quite apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal board precludes the state court from doing so''** (emphasis supplied).

The court has held then, that **procedure** in dealing with labor controversies is quite as important as the substantive rules regulating them. Cf. **Marine Cooks and Stewards v. Panama Steamship Co.**, supra; **United States v. Hutcheson,** 312 U. S. 219, 61 S. Ct. 463; **Milk Wagon Drivers Union etc. v. Lake Valley Farm Products,** 311 U. S. 91, 61 S. Ct. 122.

We shall next compare the federal policy and procedure for issuance of injunctions with the procedure used in the instant case.

Congress with the approval of the Supreme Court has manifested its desire that federal courts be kept out of the labor injunction field and that **exclusive** jurisdiction in such controversies be conferred upon the NLRB, which would also bar state jurisdiction as well. **San Diego Building Trades Council v. Garmon,** 79 S. Ct. 773. Actually the Norris La Guardia Act does permit injunctions affecting a labor dispute but only after hearing which proves that among other things, the plaintiff has no adequate remedy at law **and that the public officers charged with duty to protect complainants' property are unable or unwilling to furnish adequate protection.** It has already been shown that in none of the three incidents of picketing was there property damage done to Jefferson Bank, violence on the part of the pickets, or any indication that public officers could not cope with the situation.

This position has been taken by the U. S. Supreme Court in **Weber v. Anheuser-Busch, Inc.**, 75 S. Ct. 480, wherein the Court voided a state court injunction against picketing and acts of trespass in connection with a labor dispute. The Court said at page 487:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

Furthermore the Norris-LaGuardia Act, 29 U. S. C. A. 104, specifically declares the National Labor Policy in making specific acts not subject to restraining orders or injunctions. Subsection (f) exempts from the injunctive process "Assembling peaceably to act or to organize to act in promotion of their interest in a labor dispute." Since the federal courts cannot enjoin peaceful labor activity except on application of the NLRB, it is equally clear that state courts cannot thwart the National Labor Policy by restraining the same conduct, i. e., peaceful assembly. This is true even if the conduct is violative of a state law. **Weber v. Anheuser-Busch, Inc.**, supra; **Hill v. State of Florida ex rel. Watson,** 325 U. S. 538, 65 S. Ct. 1373; **Amalgamated Association of St. Elec. Ry. and Motor Coach Emp. of America v. Wisconsin Employment Relations Board,** 340 U. S. 383, 71 S. Ct. 359.

If the St. Louis Circuit Court injunction were to be upheld, the provisions of the Federal Act which guarantee the right to strike would be virtually meaningless. Section 13 states:

> "Nothing in this Act except as specifically provided for herein shall be construed so as either to interfere

with or impede or diminish in any way the right to strike or to affect the limitations or qualification on that right."

In **NLRB v. International Rice Milling Co.,** 341 U. S. 665, 71 S. Ct. 961, picketing has been equated with striking. Also **NLRB v. Drivers, etc.,** 80 S. Ct. 706.

If states were permitted in contravention to the National Labor Policy to enjoin conduct in labor cases and then convict for criminal contempt without a jury, few persons would be brave enough to picket or use other methods to improve their condition for fear that they would be arrested by the court and charged with participating in or causing violation of an injunction. It is also clear that states could then circumvent the National Policy by passing criminal statutes which cover numerous labor activities which would result in a considerable expansion of state jurisdiction over labor activities that fall within the jurisdiction of the NLRB. Such a result would destroy the policy of national uniformity in labor relations as expressed in and exemplified by the National Labor Relations Act, and there would not only be different standards and procedures among the states but among the races as well.[2]

It has been said by some critics of the federal preemption doctrine regarding labor controversies that if the state court cannot intervene then the State would be without a remedy to prevent acts of trespass and violence. It has also been contended that the police power of the state would be severely curtailed if the use of injunctions were denied in labor disputes. This is clearly not the case. If violence or other acts of peace disturbance erupts on the picket line, there is nothing to prevent the police from protecting private property and the public interest by making arrests on the spot. The difference between the use of injunctions and arrests under a criminal statute is in the method of enforcement. A person accused of violating an injunction is denied the usual procedural safeguards that exist in criminal cases such as jury trials and the right to be tried before a fair and impartial tribunal. Also the injunction in the instant case, like many others, constituted a prior restraint on the activities of the petitioners. It has already been stated that CORE had declared by its letter, its intention to take "direct action" against Jefferson Bank. There was never any threat of violence and in fact none occurred on August 30, 1963, or any other date. It should also be noted that the trial court never made a finding of fact that there was a clear and present danger of violence nor was there a finding that the law enforcement authorities could not handle the situation. **Thomas v. Collins**, 323 U. S. 516, 65 S. Ct. 315; **American Federation of Labor v. Swing**, 312 U. S. 321, 61 S. Ct. 568.

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[2] **Bethlehem Steel v. New York LRB,** 67 S. Ct. 1026. Compare sentences and procedure in the instant case with **In re Debs,** 15 S. Ct. 901, where Eugene Debs received a **six month** sentence after conviction for violation of an injunction against the Pullman strike (1894) in which numerous persons were killed and many railroad cars burned. Debs was struggling in behalf of the interest of the white workingman. He was a party to the injunction suit and his strike which caused delay in distribution and transportation of the United States Mails, etc., was of National proportions. In the instant case CORE members were convicted for contempt while struggling to gain jobs for Negroes. There was no violence, no one was injured (except three small children who were pushed to the ground by a deputy sheriff, receiving only bruises) and no property damage was done to the bank—not even a broken window.

In support of this contention Major Walter Eitzman of the St. Louis Police Department testified at the first contempt trial that the picketing was peaceful and that the police department could have coped with any disorder (Tr. C, 417).

Also the use of injunction is not barred if the appropriate **official** agency petitions the appropriate court for relief. The NLRB has jurisdiction to petition the U. S. Circuit Court of Appeals for the enforcement of a cease and desist order. The Federal District Court can issue a temporary restraining order, against any party who has been charged with committing an unfair labor practice. The proper procedure for the issuance of injunctions is spelled out in the Act, 29 USCA 160 (j), which states:

> "The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person who has engaged in or is engaging in an unfair labor practice to petition any United States District Court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order."

Congress, therefore, has made it quite clear that "**official**" **enforcement** of the Act by the NLRB rather than "**private initiative**" was to be the method of protecting the public interest. In **Garner v. Teamsters,** supra, the Supreme Court supports this position at page 171:

> "We conclude that when federal power constitutionally is exercised for the protection of public or private interest or both it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superceded. **To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded.** Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit.
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> "**On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board.** The respondents were subject

> to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State." (Emphasis supplied.)

It may be conceded then, that the state may punish certain types of disorder arising in labor relations controversies under its generally applicable criminal statutes. However, if states are allowed to use their power to enjoin conduct even before committed they would be in a position to further their own labor policy and thus create a conflict with the federal policy as developed by the National Labor Relations Board. It has already been demonstrated that the Norris La Guardia Act is an integral part of the federal labor policy which does not permit injunctions on behalf of private parties unless specific findings of fact supported by evidence are made.

There are other important reasons why the state court injunction in this case is in serious conflict with national labor policy.

1. The status quo could not be maintained but was necessarily altered by the injunction. Naturally a judgment or court order against any party places him at a disadvantage when attempting to garner public support for an issue.[3]

2. The pressure of the Negro for jobs, upgrading and a better life comes at a time when automation and new methods of production are increasing the percentage of unemployed of all races throughout the entire nation. The increasing competition for "Jobs Now" is bound to create more labor difficulties in the future not only in the South but also in the North where Negroes are still found at the bottom of the economic ladder. The unwritten law among many white business and civic leaders is to keep them at the bottom and thus there is great likelihood that state

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[3] Pa. Laws 1937, 1198 Purdoms Pa. Stat. Ann. 1952, Tit. 43, Sec. 206b.

labor injunctions will be widely used in the future to keep "Negroes in their place" by convicting those whom local authorities consider "troublemakers" of criminal or civil contempt without benefit of a jury trial or impartial tribunal. E. g. **NAACP v. Alabama**, 84 S. Ct. 1302; **Hamilton v. Alabama**, 84 S. Ct. 982.

3. The plight of the Negro workingman who strives to break down the barriers of racial discrimination in employment is made worse by the cost of the litigation that he must incur if state courts are allowed to enjoin his activities. Large labor unions have huge financial reserves from which to employ counsel; many labor organizations have several lawyers on their full time staffs, whose job it is to represent the union before the NLRB and if necessary to appeal an adverse decision to the Supreme Court. However, racial discrimination by both labor unions and employers has forced the bulk of Negro workers to seek organizational support outside of the established labor movement.

Such groups as CORE have few if any monetary reserves upon which to finance costly litigation. Those who supported the National Labor Relations Act, 1935, found labor unions in much the same financial condition as CORE and they made provisions for the NLRB to investigate complaints and provide a remedy that heretofore had not existed. Lawyers for the fifteen petitioners have defended the cases in the St. Louis Circuit Court, St. Louis Court of Appeals, Missouri Supreme Court, United States District Court and the United States Circuit Court of Appeals. Thousands of pages of transcript have been purchased, depositions taken, bail and legal expenses have been incurred and yet all the money thus far has been used to seek the release of those convicted of contempt of court. There was no money to finance an appeal of the state court injunction upon which the convictions were based.

The dangers inherent in this method of dealing with labor controversies are quite apparent. In the primary stages of the instant case of **Curtis et al.**, four of the original nine defendants were released by the St. Louis Court of Appeals after serving eight days in the city jail without bail. Of the remainder only one picketed inside the bank and all were convicted on charges of criminal contempt for being "leaders of CORE". There is no safeguard in Missouri Law to prevent a plaintiff from provoking violation of an injunction and then choosing the persons he wishes to have convicted of criminal contempt without a jury trial which is exactly what happened in this case. Tactics such as these have not been used in America since the early part of the Twentieth Century with regard to labor controversies.[4]

The procedure described above is admittedly a quick and efficient way of dealing with an adversary, but it places the entire power of the state on the side of those who hold the political and economic influence in the community, which is precisely what the Wagner Act was designed to prevent.

Further evidence of Congress' intent to make uniform throughout the entire country, the National Labor Policy can be found by referring to Sec. 10 (a) of the Act which states:

> "The Board is empowered as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting Commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: Provided that the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over cases in any industry

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[4] Government by Injunction, 13 Law Quarterly Review 347.

> (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, **unless the provision of the State or territory statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith''** (emphasis supplied).

States cannot enter into cession agreements with the NLRB unless the labor policy of the state is not inconsistent with that found in the National Act. It is equally clear that the procedural rights guaranteed in the Norris LaGuardia Act and the National Labor Relations Act are as important as the substantive rights contained therein. There is no counterpart to these acts in Missouri Law. Under Missouri procedure a judge may issue an injunction at his discretion ex parte i. e. without notice and hearing to the other party.[5] There is no special provision, exempting labor controversies from the application of the law. Congress passed labor legislation in the mid 1930's to bring an end to labor strife and to protect the working man from the repressive use of injunctions.

This position finds ample support in **Guss v. Utah Labor Board**, 77 S. Ct. 498, where the Supreme Court stated at page 602:

> ''We hold that the proviso to Sec. 10 (a) is the **exclusive** means whereby States may be enabled to act concerning the matters which Congress has entrusted to the NLRB'' (emphasis supplied).

And at page 603 the Court said:

> ''We are told by appellee that to deny the State Jurisdiction here will create a vast no-mans land sub-

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[5] R. S. Mo., 1959, Section 526.050.

> ject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately both may be right. We believe however, that Congress, has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's land. Congress is free to change the situation at will."

In 1959 Congress did change the situation by compelling the NLRB to accept jurisdiction in most cases.[6] In 1957 when the **Guss** case was decided the NLRB had never entered into a cession agreement with any state agency, presumably because no state had a labor policy consistent with that expressed in the National Act. It was observed in the dissenting opinion of the **Guss** case that:

> "In 1947 only 11 states had comprehensive labor statutes. Of those eight had established an administrative procedure for the adjudication of unfair labor practices while three had left these matters to conventional law enforcement agencies, prosecuting attorneys and regular courts."

It is true that some prior decisions of the U. S. Supreme Court, had tended to uphold jurisdiction of State Courts when violence was involved in a labor controversy. These were cases involving the use of injunctions to prevent **violence.** They consist of **Allen Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board,** 315 U. S. 740, 62 S. Ct. 820; **United Auto A. & A. I. W. v. Wisconsin Employment Relations Board,** 351 U. S. 271, 76 S. Ct. 794, and **Youngdahl v. Rainfair, Inc.,** 355 U. S. 131, 78 S. Ct. 206.

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[6] Labor Management Reporting and Disclosure Act, 29 U. S. C. A. 164 (c) (1).

The first two cases are appeals from rulings of the **Wisconsin Employment Relations Board.** Thus the procedure for issuing these injunctions and the substantive rules governing labor disputes were virtually the same as in the Federal Act. Wisconsin has a "Little Wagner Act" which is a state counterpart to the National Law. The only question involved in these cases was whether or not the state court or board could enjoin violent conduct. The **Allen Bradley Local** case was decided before violent conduct and other acts of coercion by labor organizations were outlawed by the Taft Hartley Act in 1947. The Court held that conduct not proscribed by the Act as presently constituted could be prevented by the State Court. However, the confusing factor is that even after the NLRB had been given jurisdiction over "improper labor conduct" the Court ruled in the **United Auto A. and A. I. W. v. Wisconsin Employment Relations Board,** supra, and **Youngdahl v. Rainfair, Inc.,** supra, that the **Allen Bradley Local Case** was still controlling. The net effect of following these two decisions would be to modify Supreme Court decisions in **Garner v. Teamsters,** supra; **Bethlehem Steel v. New York LRB,** 67 S. Ct. 1026; **Guss v. Utah,** 77 S. Ct. 598, and **San Diego Building Trades Council etc. v. Garmon,** 79 S. Ct. 773, all of which hold that **exclusive** jurisdiction to deal with unfair labor practices rests with the NLRB and not the State or Federal Courts. This is the interpretation that all of the current labor cases before the Supreme Court gives to Sec. 10 of the Act.

Thus the recent decisions of the Supreme Court have held without exception, that state and federal courts must defer to the NLRB in all matters involving unfair labor practices. The Court said in **Weber v. Anheuser Busch,** supra, at page 485:

> "A state may not enjoin under its own labor statute conduct which has been made an 'unfair labor prac-

> tice' under the federal statute. Such was the holding in the **Garner** case, supra. The Court pointed out that **exclusive** primary jurisdiction to pass on the union's picketing is delegated by the Taft Hartley Act to the National Labor Relations Board'' (emphasis supplied).

It is quite obvious that the Federal Act would have little or no effect if state courts had jurisdiction to determine the merits of a labor controversy, because the damage would already have been done by the time the matter got before the proper tribunal i. e. the NLRB. **Local No. 438 Construction v. Curry,** 83 S. Ct. 531.

Whether or not state courts or boards have jurisdiction to restrain violent conduct that is also an ''unfair labor practice'', the cases mentioned above that so indicate can be distinguished from the instant case in two ways.

1. Assuming arguendo that there is a limited area affecting labor disputes where the state may grant injunctive relief, there seems to be a quantum of disorder or violent conduct that must occur before the state may interfere. The leading case of **Weber v. Anheuser-Busch, Inc.**, supra, demonstrates this point quite clearly. In **Weber** the Missouri circuit court that issued an injunction prohibiting picketing, violence, etc., found that ''defendants (International Association of Machinist) picket line was so placed and maintained that it prevented the movement of railroad cars into and out of plaintiff's premises by a common carrier without danger of physical injury to the pickets and movement of the cars was stopped for that reason.'' The Missouri Supreme Court stated in its opinion affirming the lower court injunction and finding no labor dispute that ''the transportation into and out of the plant was stopped because it endangered their lives and limbs'' 265 S. W. 2d 330. The U. S. Supreme Court on page 75 S. Ct. 488 of the **Weber** case after taking full account of the above findings stated:

> "We do not read this as an unambiguous determination that the IAM's conduct amounted to the kind of mass picketing and overt threats of violence which under the **Allen-Bradley Local** case give the state court jurisdiction."

The Supreme Court in the **Weber v. Anheuser-Busch, Inc.** case, supra, overturned the Missouri Court injunction on the jurisdictional question, i. e. primary jurisdiction was in the NLRB and not the state court.

Comparing the conduct of the CORE pickets in the instant case with the union pickets in **Weber** one can readily see that here we are not faced with danger to life or limb and violence.

2. The injunctions in the two Wisconsin Cases and **Youngdahl v. Rainfair**, were issued **after** there had already been considerable labor unrest and violence. In other words they did not constitute a prior restraint on the activities of the labor organization. In the instant case officers and members of CORE were restrained in an ex parte proceeding before the initial picketing of Jefferson Bank and before all parties had been served with process. The facts show beyond a doubt that CORE was enjoined without a hearing in an ex parte proceeding before any misconduct had taken place. In addition the Judge who issued the restraining order made no finding of fact with regard to the allegations made in Jefferson Bank's petition for injunction. Another Judge, whose order made the temporary restraining order permanent on Dec. 5, 1963, did not include violence or threat of violence in his finding of fact (Ex. 2).

The conclusion must be that the judicial power of the State was ruthlessly used as a prior restraint to perpetuate the discriminatory practices of Jefferson Bank and Trust Co. and to thwart the drive of the Negro for equal employment opportunity which is infinitely more vital than fair housing or school desegregation. See **Schelly v. Kraemer,** 334 U. S. 1. Also more than 65% of the Negroes in St. Louis live in poverty on low family income.[7]

IV.

The state court is without jurisdiction to enjoin conduct which is arguably subject to the protection against unfair labor practices under Sections 7 and 8 of the Act.

The question presented here is, were the activities of **either St. Louis CORE or the Jefferson Bank** arguably prohibited by Section 8 or protected by Section 7 of the Act? If answered in the affirmative, it is clear that the **exclusive** jurisdiction for a determination as to whether or not such conduct is violative of the Act and its prevention is in the NLRB. In addition the question of whether or not CORE is a "labor organization" within the meaning of Section 2 (5) of the Act falls within the **exclusive** jurisdiction of the NLRB. **San Diego Building Trades Council Etc. v. Garmon,** 79 S. Ct. 773; **Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.,** 82 S. Ct. 1237.

In the instant case CORE has charged racial discrimination and other unfair labor practices committed by Jefferson Bank in violation of Sec. 8 (a) (1) and (2) and Sec. 7 of the Act, by attempting to restrain and coerce members of CORE in the exercise of their right to self organization, to bargain collectively and to engage in other concerted activities for the purpose of collective bargaining or their mutual aid and protection and by attempting to interfere with the administration of CORE by publicly denouncing and using state agencies including the sheriff's office, police department, Mayor of St. Louis, Governor of Missouri, and a court injunction to frighten and intimidate members of CORE. **Tygart Sportswear Co.**, 77 NLRB 613; **Borg-Warner Corp.**, 113 NLRB 1288; **Aldna Mills**, 79 NLRB 1; **Biff Mfg. Co.**, 82 NLRB 1081; **Radio Industries, Inc.**, 101 NLRB 912. The question of whether or not racial discrimination by an employer is an unfair labor practice has not been decided by the NLRB. However, the Board recently ruled in **Hughes Tool Co.**, 147 NLRB 166, that racial discrimination by a union is an unfair labor practice. Therefore it can be said that such discrimination by an employer is at least arguably a violation of Section 8 (a) which prohibits employers from committing unfair labor practices. Also the Civil Rights Act of 1964 should be persuasive on this subject.

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[7] **The Other America, Michael Harrington.**

The Bank alleges that CORE was guilty of unfair labor practices by violating Sec. 8 (b) (1) (A) and (B) of the Act by coercing its employees, by harassing them and by preventing their exit from and entry to the Bank and by trying to force the hiring of Negro employees. **National Maritime Union**, 78 NLRB 971; **Typographical Union** 86 NLRB 951; **NLRB v. Local 140 Furniture Workers**, 233 F. 2d 539; **Electrical Workers, U. E. Local 1150**, 84 NLRB 972. In addition the Bank charges that CORE violated Section 8 (b) (4) (D) and 8 (b) (7) of the Act by trying to force them to hire Negroes in **clerical** positions and to recognize CORE as a bargaining agent. **Longshoremen and Warehousemen Local 16**, 82 NLRB 650; **NLRB v. Drivers**, 80 S. Ct. 706.

There is no question of the NLRB's jurisdiction to police the activities of both labor and management and to prevent picketline disorder of the usual type. In **Perry Norvell Co.**, 80 NLRB 225, the Board said at page 239:

> "By Section 8 (b) (1) (A) Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of the employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force or of eco-

> nomic reprisal. In that Congress was aiming at means, not ends."

Regardless of the truth or falsity of the above allegations the Supreme Court in the **Garmon Case,** supra, has ruled that primary jurisdiction over alleged unfair labor practices is in the NLRB.[8] At page 780 the Court said:

> "**But courts are not primary tribunals to adjudicate such issues.** It is essential to the administration of the Act that these determinations be left in the first instance to the NLRB. What is outside the scope of this court's authority cannot remain within a State's power and state jurisdiction too must yield to the **exclusive** primary competence of the Board . . . It is not for us to decide whether NLRB would have, or should have, decided these questions in the same manner. **When an activity is arguably subject to Section 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the NLRB if dangers of state interference with national policy is to be averted."** (Emphasis supplied)

The rule in **Garmon** is the only means whereby federal jurisdiction can be protected from state interference.

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[8] For other cases following the Garmon rule see the following:
Ex Parte George, 83 S. Ct. 178;
Local 100, United Ass'n of Journeymen v. Borden, 373 U. S. 690, 83 S. Ct. 1423;
Local No. 207 Int. Ass'n of Bridge Etc. v. Perko, 373 U. S. 706, 83 S. Ct. 1429;
Radio and Television Broadcast Technicians v. Broadcast Service of Mobile, Inc., 380 U. S. 255;
Hattiesburg Unions v. Broome Co., 377 U. S. 126.

B.

The District Court erred in holding that the Circuit Court of St. Louis, by issuing its injunction and by convicting appellants of contempt for exercising their right of free speech, did not violate their rights under the First and Fourteenth Amendments.

I.

The conviction of appellants in Curtis et al., for allegedly advocating violation of the injunction infringed appellants' rights to free speech and assembly.

Publication of the facts of a labor dispute, whether accomplished by picketing or any other mode of expression, is entitled to the constitutional protection of freedom of speech. **Carlson v. California**, 60 S. Ct. 746; **American Federation of Labor v. Swing**, 61 S. Ct. 568.

While the right of the individual to express himself in public maintains a preferred position in American Constitutional law, this right is not without limitations. The question inevitably arises, when may the state or federal government limit free speech or assembly or punish for the exercise thereof? Of course there is no definitive answer to this question but the Supreme Court has attempted to lay down standards by which the rights of the individual versus the need of the state to protect itself, should be judged. Two basic tests are most frequently applied by the Supreme Court.

1. **The Clear and Present Danger Test** was first applied by Justice Oliver Wendell Holmes in **Schenck v. United States**, 39 S. Ct. 247. Since 1919 when **Schenck** was decided the Supreme Court has applied this doctrine in First Amendment cases involving labor relations. **Thornhill v. Alabama**, 60 S. Ct. 736; **Thomas v. Collins**, 65 S. Ct. 315;

contempt of court **Bridges v. California,** 62 S. Ct. 190; **Wood v. Georgia,** 82 S. Ct. 1364; internal subversion **Abrams v. United States,** 40 S. Ct. 17; **Whitney v. California,** 47 S. Ct. 641; previous restraints on publication **Near v. Minnesota,** 51 S. Ct. 625, and many other cases. The state may not suppress First Amendment liberties except to prevent a "Clear and present danger" of serious substantive evil and the degree of imminence must be extremely high before utterances may be punished.

2. With the **Ad Hoc Balancing Test** the Court seeks to pit the social interest in freedom of expression against the regulation which restricts expression. In applying this test the Supreme Court seeks to examine the effect of restrictive legislation. **Schneider v. State of New Jersey,** 60 S. Ct. 146; **Grosjean v. American Press Co.,** 56 S. Ct. 444; **Smith v. People of the State of California,** 80 S. Ct. 215.

The policy of the Supreme Court is to give the greatest possible latitude to free expression and least possible room for governmental regulation. The Supreme Court stated in **Thomas v. Collins,** supra, at page 323:

> "Only the gravest abuses endangering paramount interests give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."

When petitioners in **Curtis et al.** sought habeas corpus relief in the state court their claim under the First and Fourteenth Amendments was dismissed by the St. Louis Court of Appeals in two sentences:

> "The activities of the petitioners found herein to constitute contempt go far beyond those areas of freedom of speech and peaceful assembly protected

> by the constitution of the United States and of Missouri. **It has been held that the First Amendment does not confer the right to persuade others to violate the law. Kasper v. Brittain,** 6 Cir. 245 F. 2d 92." **Curtis v. Tozer,** 374 S. W. 2d 557 at page 595.

The rule in **Kasper v. Brittain,** supra, adopted by the St. Louis Court of Appeals is, undoubtedly a correct abstract statement of law, but it is a mere conclusion applying no objective standards for the determination of appellants' fundamental rights.

The precise contrary procedure was used by the court in **Kasper v. Brittain,** supra, where the clear and present danger test was applied to the facts of the case.

The Supreme Court said in **Bridges v. State of California,** 62 S. Ct. 190 at page 194:

> "Moreover the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis J., concurring in **Whitney v. California,** supra (citing page numbers), it must be 'serious' (citing page numbers).

The heart of the matter revolves around two questions. (1) Is the act of trespassing upon the property of the bank and interference with business there for ½ hour a "serious" and "substantial" evil that would warrant punishment for exercising the right to free speech? (2) If the answer to question (1) is yes, were the words of appellants so calculated and directed as to cause realization of the substantive evil?

It should be noted at the outset that in **Bridges v. California,** supra, the appellant was punished by contempt for "interfering with the administration of justice"—a vital state function. Yet the Supreme Court reversed the conviction giving even greater weight to Bridges' rights under the 1st Amendment. In **Terminiello**

v. City of Chicago, 69 S. Ct. 894, a person gave a rabble rousing speech that provoked serious disorder in the audience. His conviction of disorderly conduct and breach of the peace was reversed by the Supreme Court. In **Herndon v. Lowery,** 57 S. Ct. 732, the conviction of a Communist, convicted of insurrection, was reversed on 1st Amendment grounds. In **Stromberg v. State of California,** 51 S. Ct. 532, a similar question to **Herndon** was presented with the same result. The case books are full of instances where government has sought unsuccessfully to protect its vital interest ranging from the prevention of disorganized or organized violence to the suppression of obscenity by restricting the right to speak and utter freely.

The courts have made it quite clear that political and labor speech are matters of public concern and are to be given preferred treatment even within the already preferred realm of the First Amendment. **Thornhill v. Alabama,** supra; **Wood v. Georgia,** 82 S. Ct. 1364.

In answering question number (2) we must refer to the facts of the case in order to see how they relate to the law governing First Amendment rights. It is certain that utterance attributed to petitioners in **Curtis et al.** while picketing the bank were found to have caused violation of the restraining order on August 30, 1963—to what extent we cannot be sure. Judge Scott in his findings of fact and judgment did not make reference to specific words, thoughts or ideas expressed by petitioners, nor did he indicate to what extent, if any, these words caused violation of the restraining order (Tr. C, 1561). It must be conceded then, that Judge Scott's Findings were conclusions of fact and law and therefore did not reveal how petitioners' words and/or conduct violated the injunction.

The St. Louis Court of Appeals made more specific findings of fact with regard to the spoken words and movements of each petitioner.[1] However, these findings are not placed within the context of the First Amendment but were apparently designed to show guilty motive or conspiracy rather than a causal relationship between the words spoken and violation of the injunction. In addition the determination of the sufficiency of evidence under Missouri law to sustain a conviction, is governed by the appellate court considering as true the evidence favorable to the state and the favorable inferences to be reasonably drawn therefrom and rejection of evidence contrary to and in conflict with such favorable inferences. **State v. Akers,** Mo., 328 S. W. 2d 31, 33; **State v. Gannaway,** Mo., 313 S. W. 2d 653, 656; **State v. Harmon,** Mo., 243 S. W. 2d 326, 331. The Missouri courts did not consider seriously, the fundamental liberties of the petitioners and decided to direct their review to the issue of contempt only. However, where First Amendment rights are involved courts are required to examine the entire record in order to determine the rights of petitioners. The fact that speech or the result thereof may under state statutes be considered contempt, **Bridges v. California,** supra; breach of the peace **Edwards v. South Carolina,** 83 S. Ct. 680; advocacy of unlawful acts **DeJonge v. Oregon,** 57 S. Ct. 255; obscenity **Roth v. United States,** 77 S. Ct. 1304; or insurrection **Herndon v. Lowery,** supra, does not deprive such utterances from being judged by the standards of the First Amendment. The Supreme Court said this in **New York Times Company v. Sullivan,** 84 S. Ct. 710 at page 720:

> "In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. **NAACP v. Button,** 371

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[1] **Curtis v. Tozer,** 374 S. W. 2d 557 (The following page numbers refer to this case as it was decided in the St. Louis Court of Appeals):

Curtis, page 518; **Clay,** page 579; **Seay,** page 579; **Perkins,** page 580; **Richards,** page 580.

> U. S. 415, 429, 83 S. Ct. 328, 9 L. Ed. 2d 405. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this court, libel can claim no talismanic immunity from constitutional limitations. **It must be measured by standards that satisfy the First Amendment.**" (Emphasis supplied.)

Of course it is easy to take unfavorable statements out of context and make a case for contempt or conspiracy. But by examining the entire record one may readily see that petitioners in **Curtis et al.** actually encouraged compliance with the restraining order rather than its violation.[2] Furthermore the fact remains that none of these petitioners stood in front of the doors of the bank and none of them sat on the floor and blocked tellers' windows inside the bank. The activities of Lucian Richards were alleged to have occurred **after** persons were already in the bank. If he was singing inside the bank this certainly did not cause others to do so and singing does not in itself appear to be a violation of the restraining order or a "substantive" evil. Reverend Charles Perkins' protest over the pushing of three small children by a deputy was made directly to the Sheriff, **after** persons had already entered the bank and sat on the floor. The fact that Robert Curtis entered the bank and encouraged the persons inside to leave does not indicate that he encouraged violation of the restraining order but that he helped to secure compliance with it. There was no indication that the pickets inside the bank were ready to leave until Curtis asked them to do so. The St. Louis Court of Appeals went so far as to quote in its opinion a statement by Curtis to a television reporter, even though 80% of the sound tape had not been saved by the station and the sequence of the remaining tape was not in order (Tr. C, 905) (See **Curtis v. Tozer,** 374 S. W. 2d 577). Most of the evidence against petitioners in **Curtis et al.** was refuted by other witnesses for the prosecution. The St. Louis Court of Appeals found that all petitioners except Richards raised their hands at the meeting on the parking lot. This finding is totally false, but even if true it is hard to see how raising ones hand could cause violation of a restraining order. In short the small amount of evidence against petitioners (to say nothing of the great amount of favorable testimony) is not related in any way to an objective (whether clear and present danger or any other) standard for the determination of petitioners' rights to free speech and assembly under the First Amendment. Therefore, if any one of the petitioners publicly or openly advocated violation of the injunction before such violation occurred, the evidence must also show that this act caused violation of the injunction and thereby created a substantial danger to the **state.**

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[2] The following page numbers refer to the transcript and depositions in **Curtis et al.** The depositions were taken under the rules of civil procedure and were entered into evidence at the end of the trial (Tr. C, 1550-1). **Clay** (Tr. C, 859, 1426, 1486) (Clay Dep. 7, 22-23; Curtis Dep. 37; Thompson Dep. 62; Perkins Dep. 31); **Seay** (Seay Dep. 7, 20, 24; C. Oldham Dep. 41); **Curtis** (Tr. C, 478, 756, 855-6, 871, 990, 798-799, 1427, 1493) (Curtis Dep. 33; Clay Dep. 19, 10; Thompson Dep. 12; Perkins Dep. 31); **Richards** (Tr. C, 1420); **Perkins** (Tr. C, 1013-14, 102, 205).

In conclusion, if the answer to the first question is that no serious and substantial evil was involved, it would be unnecessary to answer the second question relating to whether or not petitioners' words actually caused violation of the injunction. Both questions must be answered in the negative on the basis of both fact and law. Also the proceeding of this case in the courts of Missouri have been grossly inadequate and defective. The Supreme Court in **Wood v. Georgia,** 82 S. Ct. 1364, where the lower court gave little consideration to the facts as they applied to the clear and present danger rule, said at pages 1371, 72:

"Despite its conclusion that the petitioners' conduct created a serious evil to the fair administration of justice the Court of Appeals did not cite or discuss the Bridges, Pennekamp or Harney cases, nor did it display an awareness of the standards enunciated in those cases to support a finding of clear and present danger. **It simply adopted as conclusions of the law the allegations made in the contempt citation.** The court did not indicate **how** the publications interfered with the administration of justice. Unlike those cases in which elaborate findings have been made to support such conclusions, this record is barren of such findings."

"**. . . Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression.**" (Emphasis supplied.)

II.

The injunction on its face and as applied violated appellants' rights under the First and Fourteenth Amendments.

We have already established that the right to picket for the purpose of advertising the facts of a labor dispute is protected by the First Amendment. It must also be conceded that petitioners' right to picket in the cases at bar was never challenged and in fact the injunction issued by the St. Louis Circuit did not bar picketing.

The first question presented is, did the injunction abridge actually or potentially petitioners' right to picket and peaceably assemble? If it did not, petitioners would have no cause to complain on First Amendment grounds. On the other hand if petitioners' rights were abridged the state must show adequate justification for it.

Restraints on the exercise of First Amendment rights need not be direct or obvious to make them unconstitutional. The court must examine the effect of the restraint in order to determine whether or not First Amendment rights have been abridged and the court will also inquire into other possible unconstitutional applications. The Supreme Court makes this quite clear in **NAACP v. Button,** 83 S. Ct. 328 at pages 337, 338:

> "Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. **Thornhill v. Alabama,** 310 U. S. 88, 97-98, 60 S. Ct. 736, 741-742, 84 L. Ed. 1093; **Winters v. New York,** supra, 333 U. S. at 518-520, 68 S. Ct. at 671-672. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. **The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions"** (Emphasis supplied).

In examining the effect of the injunction and its application to the cases at bar we find several reasons for our assertion that the rights of petitioners have been unconstitutionally abridged.

1. There were no adequate safeguards available to protect the right of petitioners to picket and peaceably assemble. The most important decision requiring adequate safeguards to protect First Amendment rights can be found in **Speiser v. Randall,** 78 S. Ct. 1332 where the Supreme Court said at page 1339:

> "To experienced lawyers it is commonplace that the outcome of a lawsuit and hence the vindication of

> legal rights depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. Cf. **Powell v. State of Alabama,** 287 U. S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 158. When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the working of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances **Dennis v. United States,** supra, **Whitney v. People of State of California,** supra, the procedures by which the facts of the cases are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. Compare **Kunz v. People of State of New York,** 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280, with **Feiner v. People of State of New York,** 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 295. It becomes essential, therefore, to scrutinize the procedures by which California has sought to restrain speech".

It is to be noted that the law declared unconstitutional by the Court in **Speiser** required a non-communist oath before a tax exemption would be allowed. In other words advocacy or association was indirectly punished by withholding tax concessions; there was no direct burden on free speech or association. This situation is similar to that in the cases at bar where picketing per se was not banned by the St. Louis Circuit Court. The injunction here was issued at about 2:00 p. m., only two hours before the picketing was slated to begin. Most of the petitioners did not learn of the injunction until they arrived at the bank or had been handed a copy of the restraining order. Few of the other persons present knew of the injunction. Consequently there was no time for the officers of CORE to call a special meeting to decide what to do about the injunction. Therefore lack of adequate advance notice and time to meet was a serious handicap to CORE. It is difficult enough to plan and execute a picket line where large numbers of unknown persons participate and the possibility of racial antagonisms exists, without having to cope with an injunction handed out at the last minute.

There was no conflict at the trial as to what caused the pickets to enter the bank. The pushing of three small children to the ground by a deputy sheriff caused about 50 persons to enter the bank. This is a tactic used in the early part of this century. Industrialists frequently hired groups of strike breakers and "Pinkertons" to incite violence, however, only the workers were arrested and charged with contempt or other offenses against the law. At that time conviction was assured because law enforcement authorities and judges were partisans of management.[3]

Although most petitioners in **Curtis et al.** tried to prevent violation of the injunction, they and four others were convicted of contempt and sentenced to long jail terms. None of these persons picketed inside the bank or stood in front of the doors of the bank. Wayne Millsap, attorney for Jefferson Bank, chose the person he wished to charge with contempt. He filed an application for contempt citation on August 31, and all 9 were held under $10,000 bond each. Five were forced to remain in jail in lieu of $50,000 bond. After conviction, all defendants were denied bail by Judge Scott. Marian and Charles Oldham, Herman Thompson and Raymond Howard were released by the St. Louis Court of Appeals but only after spending 8 days in jail.

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[3] The Labor Injunction, Frankfurter and Greene.

Under Missouri law a judge may issue an injunction without notice to the opposing party. He may attach for contempt, hear the case without a jury and give an unlimited sentence or fine. There is no appeal from criminal contempt in Missouri, therefore the judge may deny bail while convictions are being tested by writ of habeas corpus. It stands to reason that the method of enforcement of an injunction (Contempt without jury or impartial tribunal or bail) could have a substantial effect on whether or not a person would choose to exercise his First Amendment rights by picketing anywhere his conduct was circumscribed by an injunction. We have clearly shown that the procedures used to protect the constitutional rights of the four persons whose convictions were reversed after they had served part of their sentences. And as the rule in **Speiser v. Randall**, supra, teaches "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights."

In **Thomas v. Collins**, 65 S. Ct. 315 the Supreme Court reversed a contempt conviction based on a Texas injunction forbidding a labor organizer to solicit members. The Court said at page 324:

> "That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. A

> speaker in such circumstances could avoid the words 'solicit', 'invite', 'join'. It would be impossible to avoid the idea."

And at page 317 the Court said:

> "For reasons to be stated we think the statute as it was applied in this case imposed a previous restraint upon appellant's rights to free speech and free assembly and the judgment must be reversed."

We must conclude from the foregoing that the injunction was not only a restraint on the right to picket and assemble but it was also a **prior restraint** on these rights. To justify such restrictive action the state must show that a serious state interest is immediately endangered by the exercise of these rights and that no lesser restriction would suffice to protect the public interest. However if the restriction proposed violates the rule against prior restraints (as does the injunction in the case at bar) the substantive evil which the state seeks to avert must be shown to be of a unique severity, an evil qualitatively more damaging in its injury to the public than such as would justify restriction not violating this rule. The rule against prior restraints may be ignored in rare situations but only if all lesser regulations are demonstrably insufficient to protect vital state interests. See **Near v. Minnesota,** 51 S. Ct. 625.

Once having been convicted on trumped up charges, they did not wish to repeat this experience.

It is significant that 4 of the 9 defendants in **Curtis et al.** were found not guilty by the St. Louis Court of Appeals. Thus, the Missouri court without applying First Amendment standards and considering only evidence favorable to the state, has declared that almost half of the original 9 defendants were wrongfully convicted. In addition, petitioners in **Ford et al.** and **Grand et al.** were not members of CORE nor were they bound by the injunction or parties thereto. The injunction, $10,000 bail, midnight arrests, denial of bail and excessive sentences were designed to put Negroes back in their place and to frighten Negroes throughout the city. After this example was made of 9 so called "leaders" of CORE only the bravest of persons dared join CORE or participate in its activities. This injunction threatened not only CORE members but the general public as well. As **NAACP v. Button,** supra, teaches, a decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record disclosed that anyone has engaged in privileged conduct. The fact that petitioners in **Ford et al.** and **Grand et al.** were not members of CORE or parties to the injunction adequately demonstrates that the entire world was threatened by the injunction. The threat of punishment can effectively deter free expression. **NAACP v. Button,** supra. For as **Thomas v. Collins,** supra, teaches, CORE members and all other persons who picketed the bank were under a continuing threat of the restraining order backed by the power of contempt.

While speaking of procedural safeguards an interesting question is raised—what standards, if any, did the trial court use to determine petitioners' guilt? Missouri law requires that guilt be proved by the state beyond a reasonable doubt as in other criminal cases, but this standard is not indicated here. See **Osborne v. Purdome,** Mo., 250 S. W. 2d, l. c. 163. By referring to the Findings of Fact and Judgment we are unable to find any statement saying "defendant is guilty beyond a reasonable doubt" (Tr. C, 1587). We cannot know how Judge Scott arrived at his verdict. We do know, however, that the findings were not specific. They were copied verbatim from the specifications in the Notice of Contempt prepared by Wayne Millsap. It is hard to imagine how a judge could find that all petitioners committed contempt in exactly the same manner after two weeks of trial and more than 1,000 pages of testimony. This anomaly is nothing less than fantastic. Petitioners were never informed as to their specific words or conduct found to have been in violation of the restraining order. The question still persists—what standards did the trial court use in determining guilt? The failure of the record to disclose how the findings (which were in reality conclusions of fact and law) were made, indicates gross lack of procedural safeguards for petitioners' constitutional rights.

As we have stated before, the procedure for the determination of guilt on appeal was to consider only the evidence and inferences favorable to the state. By these standards, any evidence of guilt is sufficient to sustain a conviction. These procedures allow no room for the correction of error or the vindications of First Amendment rights.

The procedures used in these cases failed to provide adequate safeguards for the correction of error in the issuance of an ex-parte injunction. The injunction was issued on August 30, but defendants were not directed to show cause why the temporary restraining order should not be granted until September 26, 1963. This allows the abridgment of First Amendment freedoms for at least one month without a hearing.

It is clear that the injunction in the cases at bar was designed to or had the effect of penalizing individuals who were members, prospective members, affiliate or contributors of CORE and it effectively detered persons from associating with, aiding or supporting CORE.

According to the rule laid down in **Speiser v. Randall,** supra, the procedures in the cases at bar failed to provide adequate safeguards to protect the free exercise of speech (picketing) and assembly in that: (a) lack of adequate notice and time to meet concerning the injunction, (b) the restraining order issued ex parte without notice or hearing and without petitioners having an opportunity to defend, allowing petitioners to be convicted on charges reminiscent of the early 1900's, (c) the method of enforcement by contempt without jury trial and impartial tribunal is inconsistent with adequate procedural safeguards within the domain of First Amendment rights, (d) the injunction was a prior restraint on the activities and expression of not only petitioners but was designed to and had the effect of intimidating the entire Negro community, (e) error in issuing such an ex parte order affecting free expression could cause irreparable delay to the opposing party, (f) no discernable standards for the determination of guilt appear in the record.

2. Any one of the grounds referred to above would suffice to brand the injunction unconstitutional but there are other reasons why it cannot stand. Assuming *arguendo* that the objective or purpose of the injunction is legitimate, the court must examine it to be sure that it is applied narrowly so as not to stifle fundamental rights. The controlling authority for this position is found in **Aptheker v. Secretary of State**, 84 S. Ct. 1659, wherein the court made the following rulings:

> "For essentially the same reasons this Court has concluded that the constitutionality of the statute in **Thornhill v. Alabama** should be judged on its face:
>
> "An accused after arrest and conviction under such a statute (on its face unconstitutionally abridging freedom of speech) does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and evidence introduced against him. 310 U. S. at 98, 60 S. Ct. 712.' "Similarly since freedom of travel is a constitutional liberty closely related to rights of free speech and association, **we believe that appellant in this case should not be required to assume the**

> **burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel.**" 84 S. Ct. at page 1669.

In addition **NAACP v. Button,** supra, holds:

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." 83 S. Ct. at 338.
>
> "As construed by the Court Chapter 33, at least **potentially,** prohibits every cooperative activity that would make advocacy of litigation meaningful. If there is an internal tension between **proscription and protection in the statute, we cannot assume that, in its subsequent enforcement ambiguities will be resolved in favor of adequate protection of First Amendment rights.** Broad prophylactic rules in the area of free expression are suspect (citing cases). Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 83 S. Ct. at 340.

The Rules as enunciated by the Supreme Court in the **Aptheker** and **Button** cases demonstrate that (1) the state has the burden of proving that its statute or injunction meets the requirements of the First Amendment, (2) that a statute or injunction may not even potentially prohibit or curtail First Amendment activity.

As we stated before picketing per se was not barred by the injunction; however in reality it is impossible for even a lawyer (not to mention a layman) to tell what was permitted or prohibited. For example what does it mean when the court says in paragraph (a) of the restraining order: "Physically hindering, obstructing, interfering with, delaying, molesting or harassing'' or (b) ''and therein engage in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees,'' or (c) ''Physically hindering, obstructing, interfering with, intimidating or in any other manner, preventing customers?'' We are not informed as to what conduct constitutes ''annoys" or ''harasses.'' The plain fact is that conduct which may ''annoy'' or ''harass'' one person may not have the same effect on another. It is quite possible that picketing or the very presence of CORE members at the bank ''annoyed'' or ''harassed'' the bank's officers and employees. On the other hand many of the bank's customers were glad to see CORE attempting to get jobs for Negroes and some joined the picket line. The injunction in the cases at bar is far too vague to meet the standards of constitutionality laid down in the **Aptheker** and **Button** cases. It must therefore be judged unconstitutional on its face and as applied to petitioners herein.[4]

3. Even if adequate safeguards existed to protect petitioners' rights and the injunction was not unconstitutionally vague, a clear and present danger of a substantial evil to the state must exist before First Amendment rights may be abridged. This point was covered under the previous heading. It will suffice to say that considering the non-violent character of CORE and the total lack of violence both before and after issuance of the injunction,

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[4] Also see **Smith v. People of State of California,** 80 S. Ct. 215, where the Court said at pages 217, 218: "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. **Thornhill v. Alabama,** 310 U. S. 897-98, 60 S. Ct. 736, 741, 742, 84 L. Ed. 1083; Cf. **Staub v. City of Baxley,** 355 U. S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 1302. And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentiality inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. **Winters v. People of State of New York,** 333 U. S. 507, 509-510, 517-518, 68 S. Ct. 665, 667, 671, 92 L. Ed. 840".

no clear and present danger can be said to have existed (Tr. C, 417). Moreover, if a clear and present danger did in fact exist, why did the authorities wait until the night of August 31 to apprehend petitioners? Why were no arrests made at the bank on August 30 where the danger was said to have occurred? Why was petitioners' bond set at $10,000 when all were professional men and not likely to escape the court's jurisdiction? The answers to these questions have not been revealed and probably never will be.

Although some cases hold that First Amendment freedoms may not be suppressed, even to prevent subversion,[5] we find unanimous authority to support the contention that the danger must be to the **state**[6]—no lesser interests will suffice. The Supreme Court said in **Herndon v. Lowery,** 57 S. Ct. 732 at page 739:

> "The power of the state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state."

Private injury to an employer is insufficient to justify injunctive suppression of free speech or assembly.[7] For a "private" injunction suppresses free speech quite as effectively as an injunction obtained by the state; and where any remedy is sought against speech related to matters of public concern, the granting or denial of such remedy cannot depend upon the public or private character of the applicant. The **Swing** case which held unconstitutional an injunction sought and obtained by a private party makes this clear. In **American Federation of Labor v. Swing,** supra, Justice Frankfurter speaking for the court said at page 570:

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[5] **Wieman v. Updegraff,** 73 S. Ct. 215, 217.

[6] **Sweezy v. State of New Hampshire,** 77 S. Ct. 1203, 1214; **American Communication Ass'n v. Douds,** 70 S. Ct. 674, 683; **Bates v. City of Little Rock,** 80 S. Ct. 412, 417.

[7] **American Federation of Labor v. Bain,** 106 P. 2d 544, 559 (concurring opinion).

> "Communication by such employees of the facts of a dispute deemed by them to be relevant to their interests can no more be barred because of concern for the economic interest against which they (the pickets) are seeking to enlist public opinion than could the utterance protected in Thornhill's case."

In the cases at bar the private character of Jefferson Bank totally prohibits the use of an injunction limiting First Amendment rights regardless of the danger to the bank's business. Not even a minor state interest has been alleged or proved.

There are cases however, that permit picketing to be circumscribed or in some cases barred. (Of course there are many injunction cases under the National Labor Relations Act as amended. We only consider here cases involving the First Amendment.) These cases have justified restriction on First Amendment rights on one of two grounds: (1) The state, in enforcing some public policy, whether of its criminal or its civil law, may, in some cases, constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.[8] (2) Repeated acts of violence.[9]

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[8] **Giboney v. Empire Storage and Ice Co.,** 69 S. Ct. 684;
Hughes v. Superior Court, 70 S. Ct. 718;
International Brotherhood of Teamsters v. Hanke, 70 S. Ct. 773;
International Brotherhood of Teamsters v. Vogt, 77 S. Ct. 1166;
Local Union No. 10, United Ass'n of Journeymen v. Graham, 73 S. Ct. 585;
Building Service Employees International v. Gazzam, 70 S. Ct. 784.

[9] **Hotel and Restaurant Employees International Alliance Local v. Wisconsin Employment Relations Board,** 62 S. Ct. 706.
Milk Wagon Drivers v. Meadowmoor Dairies, 61 S. Ct. 552.

The cases at bar may be distinguished on both of the above mentioned grounds. In the "violence" cases two factors are common to all. First, picketing must be accompanied by repeated acts of violence. Secondly, an injunction may not issue until **after** a pattern of violence has been established. Isolated acts will not suffice. In the "public policy" cases, the state on occasion has been permitted to bar picketing if such picketing would make the state policy a dead letter. **Giboney v. Empire Storage and Ice Co.**, 68 S. Ct. 684. This was the situation in the **Hughes** case where California had chosen to implement its fair employment policy in another manner. The Supreme Court ruled that the state court could bar picketing in this instance because the state had chosen an alternative remedy for petitioners to pursue.

The cases at bar can be distinguished from **Hughes v. Superior Court**, supra, on two grounds relating to public policy (we only consider public policy here, procedures, pre-emption, vagueness, etc., have been considered elsewhere) (1) The St. Louis Circuit Court made no reference to Missouri public policy relating to job discrimination. It is clear that the injunction was issued to protect the **private** right of Jefferson Bank and this being the case only the manner of picketing was circumscribed—not picketing per se. If public policy had been the issue, effectuation of the policy would require that all picketing be banned. (2) No effective alternative remedy existed for petitioners to pursue. It is true that Missouri has a Fair Employment Law. This law is supposed to be enforced by the Missouri Commission on Human Rights with a budget of $24,000 a year. Negroes are found at the bottom of the economic ladder in Missouri with an unemployment rate of more than double that of Caucasians. In addition more than half of St. Louis Negroes live in poverty on low family incomes.

The fact that no alternative policy exists in Missouri is eloquently stated by the man who is supposed to enforce the Fair Employment Law.[10]

To sum up, the following conclusions are set forth: (1) the injunction issued by the St. Louis Circuit Court and the procedures adopted for petitioners apprehension, bail, trial, etc., were designed to and had the effect of deterring Negroes in St. Louis from exercising their First Amendment rights, thereby making numerous persons reluctant to join CORE or participate in the job campaign at Jefferson Bank (2) no substantial danger to any valid state interest existed before or after issuance of the injunction (3) the burden is placed on the state to show imminent danger to a compelling **state** interest before First Amendment rights may be abridged (4) this burden obtains even after conviction and throughout the course of appeal (5) even when substantial danger to the state does exist, the state must provide adequate procedural safeguards for the protection of First Amendment rights and the statute or injunction must be specific as to the prohibited activity (6) the injunction herein is unconstitutional both on its face and as applied to petitioners.

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[10] In accepting the Man of the Year Award from the St. Louis Junior Chamber of Commerce on March 11, 1965, Peter C. Robertson, Executive Director of the Missouri Commission on Human Rights, said:

> "Before I conclude I must make one last observation on the framework of law here in the State of Missouri. As of now it is just that, a 'framework'. If it is to be meaningful, and if it is to provide the Negro with a legal alternative to demonstrations, and the State of Missouri is determined to solve these problems through law then something solid must be put within the framework. For, just as our legal institutions in the past have not really made any meaningful attempt to obtain equal rights for Negroes so here in the State of Missouri the legislature which passed the Fair Employment Law did not really intend that it be used as a meaningful instrument of obtaining equal rights for our Negro citizens, for they financed it only to the extent of $24,000 a year. $24,000, and permitted the hiring of one man, to cover the entire State of Missouri. That is no alternative! However we are optimistic that the legislature intends to rectify that shortcoming in this session. If they do not then Missouri will face these very serious problems with no meaningful alternative—with no way to honestly urge citizens to use the 'courts and not the streets.'"

C.

The District Court erred in holding that the terms of the injunction and the procedures used to convict appellants did not deprive them of rights guaranteed by the Fifth, Sixth and Fourteenth Amendments.

I.

Appellants in Ford et al. were not allowed a reasonable time to prepare for trial.

Petitioners in **Ford et al.** were arrested by the St. Louis Police Department on charges of trespassing, on October 4, 1963, between the hours of 4 and 6 p. m. A writ of attachment issued at 7:30 p. m. directing that they be taken before Judge Scott (Tr. F, 4; 10/4/63). They were represented by "volunteer" counsel who were allowed about 30 minutes to prepare for trial. The Court took testimony of 3 witnesses, admitted petitioners to bail and recessed at about 3 a. m. on October 5th. Petitioners were instructed to reappear in court on October 7, to show cause why they should not be held in contempt of court for violating an injunction issued on August 30, 1963 in the case of **Jefferson Bank v. Curtis et al.** (Tr. F, 70-73; 10/4/63). On October 7, defense counsel announced not ready and objected to continuing to trial, asking for a three week continuance (Tr. F, 3). This motion was overruled, whereupon 3 hours were granted in order for defendants to seek a writ of prohibition (Tr. F, 3-4). The St. Louis Court of Appeals denied the writ and petitioners proceeded to trial after several objections were made (Tr. F, 4-16).

The questions presented are (1) how much time did Judge Scott grant for defense preparation? (2) was this length of time sufficient to meet the standards of due process under the 14th Amendment?

In answering the first question we now consider the proceedings of October 4 and 5. In some parts of the transcript there is an effort to call this proceeding an "arraignment or preliminary hearing". However, petitioners contend that this proceeding was the beginning of the trial—for two reasons: (1) A preliminary hearing seeks to separate the function of the trial judge and the preliminary hearing judge, in order to insure that the defendant is not prejudiced by being tried by the same judge who received the evidence against him in an earlier hearing.[1] (2) At the close of the plaintiff's case Judge Scott admitted into evidence all of the testimony of October 4th and 5th. This was done over the objection of defense counsel (Tr. F, 264-5). Therefore, the previous testimony of Dillon Ross and Joseph McConnell was not subject to cross-examination by defense counsel. Since this evidence was admitted and used against petitioners there can be no doubt that the trial began on Friday, the 4th of October, after about 30 minutes preparation for trial.

The answer to the second question is clear. In the case at bar two petitioners were sentenced to one (1) year in prison after receiving only thirty minutes to prepare a defense. If two lawyers had not volunteered their services on the spot, they would also have been convicted without aid of counsel. As matters stood they were effectively deprived of their right to counsel of their own choosing. This would also have been true even if the trial had begun on Monday the 7th of October; since most St. Louis law offices are closed on Saturday and Sunday, their earliest opportunity to obtain counsel of their own choosing would have been Monday morning. See **Cooke v. U. S.**, 45 S. Ct. 390.

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[1] In **Jaben v. United States**, 85 S. Ct. 1365 (1965), the Supreme Court held:

> "This Court in **Girodenello** held that a finding of 'probable cause' must be made by a 'neutral and detached' magistrate who 'assess(es) **independently** the probability that . . . (an accused) committed the crime charged."

There was obviously no waiver of petitioners' right to have "reasonable" time to prepare a defense. When Robert Wilson, attorney for petitioners, stated "We are ready your Honor" on October 7th, he meant that defense counsel were as ready as they could be under the circumstances (Tr. F, 4). It must be remembered that he objected to the taking of testimony on October 4th (Tr. F, 13-15; 10/4/63) and that he had just requested a three week continuance and when this was denied he was granted two hours to apply for a writ of prohibition in the St. Louis Court of Appeals. He only proceeded to trial after every other avenue to obtain time had been exhausted. He clearly did not waive petitioners' right to time for preparation of a defense either expressly or by implication; on the contrary he did everything in his power to procure it.[2]

II.

The appointment of Wayne Millsap as "special prosecutor" and his conduct before, during and after the trials deprived appellants in Curtis et al. of their rights under the Fifth Amendment and all appellants of their right to a fair and impartial trial.

The record clearly shows that the appointment of Wayne Millsap as "special prosecutor" for the Court substantially prejudiced the right of petitioners to a fair and impartial trial for the following reasons:

1. Wayne Millsap was the lawyer for Jefferson Bank and Trust Co. He initiated the contempt proceedings by direction of the Board of Directors of the Bank (Tr. C, 120). He is the son-in-law of the bank's president, Dillon Ross and a director of the bank. He and the bank had a pecuniary interest in the outcome of the trials which

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[2] With regard to the waiver of constitutional rights, the Supreme Court took the following position in **Glasser v. United States**, 62 S. Ct. 457, at page 465: "To preserve the protection of the Bill of Rights for hard-pressed defendants, every reasonable presumption against a waiver of fundamental rights is indulged."

were allegedly held to "vindicate the majesty of the law and the dignity of the court". This pecuniary interest stemmed from two sources: (1) The Jefferson Bank and CORE were engaged in a conflict of economic interest over the hiring of Negroes. (2) The bank would be liable for damages for false arrest or malicious prosecution if petitioners were acquitted. See 42 **Am. Jur.** 11, at page 243:

> "And in some jurisdictions statutes have been enacted which expressly forbid assistance of an attorney in a criminal prosecution if he is interested in a civil action in which a recovery might be had on what is involved in the criminal prosecution."

It should be noted that no one has contended that "impartial" or "disinterested" persons were unavailable to perform this function for the court. However, the special interest of Millsap explains why he did everything in his power to inflame the public against petitioners and to deny them a fair and impartial hearing, both during the trials and while writs of habeas corpus were pending in the St. Louis Court of Appeals. "A fair trial in a fair tribunal is a basic requirement of due process." **In re Murchison,** 349 U. S. 133, 136.

2. During the trial of **Curtis et al.,** information was revealed about Millsap's attempt to intimidate one of his own witnesses. This witness was a young girl—sixteen years of age; he threatened to charge her with contempt and extradite her brother from Wisconsin if she did not "cooperate" (Tr. C, 722-29). Defense counsel asked that Millsap be replaced as "special prosecutor" and/or an additional member of the bar be appointed (someone with no special interest in the outcome of the case) to assist him. This request was summarily overruled and Millsap remained in the case as the sole prosecutor (Tr. C, 730-33).

3. In R. S. Mo. 1959, Supreme Court Rule 4.20, we find the following admonition:

> "4.20 NEWSPAPER DISCUSSION OF PENDING LITIGATION. Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement."

In spite of the Canons of Ethics regulating the conduct of Missouri lawyers, Wayne Millsap issued numerous denunciations of CORE through the media of radio, television and the press (Ex. 2). He sought to accomplish this objective anonymously with a large paid advertisement entitled "Facts on Jefferson Bank and Fair Employment." This ad was paid for by Jefferson Bank and printed while the trial of petitioners in **Ford et al.** was in progress. In addition the executive committee of the St. Louis Bar Association, while Millsap was a member, voted to issue a press release denouncing petitioners, who had just been sentenced and were seeking release on writs of habeas corpus. This unprecedented action of the St. Louis Bar served to place the entire weight of the Bar against them. There can be no doubt that the activities of Millsap and Jefferson Bank prejudiced petitioners' right to a fair and impartial trial.[3]

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[3] The following statements by Millsap can be introduced into evidence if the Court sees fit to grant an evidentiary hearing:

8/28/63 **Post Dispatch**—Millsap "to hire a certain number of Negroes would violate Missouri and St. Louis Fair Employment Laws. Demonstrations may impede progress of Negroes."

8/30/63 **KMOX-TV-KSD-TV**—Millsap "Leadership of CORE consists of attorneys. Ray Howard said that there would be a peaceful demonstration. He represented to the Court that there was never any violence at a CORE demonstration. We didn't have to allow picketing but it was allowed because we believed Mr. Howard. The lawyers in CORE vio-

4. When petitioners in Curtis et al. attempted to discover the names of plaintiff's witnesses, Millsap filed answers to interrogatories listing more than 100 possible witnesses. They included all of the bank's employees, all sheriff's deputies and all policemen at the scene of the picket line. Millsap would not divulge the names of the witnesses he intended to use at the trial. Defense counsel were put to the task of taking the depositions of all persons listed in Millsap's answer to interrogatories (Tr. C, 38; 9/3/63). In addition Millsap waited until the 18th of September to file an amended answer to interrogatories listing 14 additional witnesses. These names were not received by defense counsel until Friday, 20th of Septem-

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lated the ethics of their profession in precipitating this dastardly deed. This is the worst contempt of judicial orders ever done in the city. The law was clear to all of the demonstrators. The court could fine and imprison persons who are in contempt. Also with regard to the lawyers this matter will be taken up with the bar association. Mr. Howard said that only a small number of picketers would be there at the bank. Mr. Howard, Mr. Curtis, and Mr. Oldham violated the court order. This matter will be taken up with the bar association. The court will enforce the order of the court."

8/31/63 **Post Dispatch**—Millsap "flagrant violation of court order; Ray Howard misrepresented himself to the court."

9/12/63 **KSD-TV**—Millsap "We will not be coerced into hiring Negroes; we will work with the Mayor's Council on Human Relations." McConnell "People on picket line are not qualified."

10/11/63 **Post Dispatch, Globe Democrat, Argus, American** "Facts on Jefferson Bank and Fair Employment." This paid ad was published during the trial of Ford et al.

10/11/63 **KMOX-TV-KSD-TV**—Joint press conference with Millsap, Ross, and McConnell "Persons on picket line were referred to as 'animals'". There were many other defamatory statements about CORE.

10/15/63 **KMOX-TV**—Millsap "Bank has not refused to meet with anyone but will never meet with CORE". Other statements by McConnell and Ross.

10/27/63 **Post Dispatch, Globe Democrat**—Statement by John Shepherd, President of St. Louis Bar Association. "Contempt for the law and the courts breeds anarchy. No matter how distasteful to individual citizens, a judgment of a court having full jurisdiction must be obeyed. This is a basic tenet of our system of government. Lawyers as officers of the courts have a special duty to uphold judgments and urge compliance therewith.

"Any doctrine which is based on defiance of court orders can never be justified in our society, regardless of the end result sought by such defiance. Such orders are always subject to review by ordinary judicial processes."

"The Bar Association of St. Louis, composed of almost 2000 lawyers, believes firmly in the above principles and looks with dismay upon any efforts to subvert them."

ber. The next two days were Saturday and Sunday and the trial commenced on Monday the 23rd. There was no time to take depositions of these witnesses.

Furthermore, defendants were not served with official notices of charges and specifications until the 19th of September, 1963. These notices were the only official information petitioners received of the charges against them and they arrived only three full days before the trial began, two of these days being Saturday and Sunday. Indicative of the tactics used by Millsap throughout the trials, is the fact that he did not request Judge Scott to appoint him as special prosecutor and to authorize the issuance of notices until the 18th of September. Previously petitioners were laboring under the assumption that they were to be tried for civil contempt.

5. Millsap (with knowledge that he intended to press charges for criminal contempt) took petitioner's depositions on the 7th and 8th of September under the rules of civil procedure (Tr. C, 39; 9/3/63). See Sections 492.450, 492.460, 492.480, R. S. Mo. Petitioners in **Curtis et al.** were lead to believe that the charges were for civil contempt and thus were effectively deprived of their right not to testify against themselves. The right of an accused not to give evidence against himself is protected from state infringement by the Fifth and Fourteenth Amendments. **Malloy v. Hogan,** 378 U. S. 1; **Griffin v. California,** 85 S. Ct. 1229 (1965).

It was **after** these depositions were taken that Millsap filed notices of criminal contempt.

As if these pre-trial tactics were not sufficient deprivation of petitioners' constitutional rights, Millsap introduced in evidence parts of the depositions as "admissions against interest" (Tr. C, 1128). Defense counsel objected to their admission but were overruled (Tr. C, 1135-

44). Because of this adverse ruling petitioners were compelled to introduce the entire depositions in order to correct the factual distortions created by the admission of selected parts. Judge Scott clearly claimed the right to consider petitioners' involuntary statements in arriving at his judgment.[4]

It would be a gross understatement to assert that Millsap's conduct before, during and after the trials did not measure up to the best traditions of a lawyer advocate. About such matter Mr. Justice Sutherland had this to say in **Berger v. United States,** 55 S. Ct. 629 at page 633:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

To sum up the following conclusions are reached: (1) That Millsap had a "special" interest in the outcome of the contempt trials. (2) That he deceived and intimidated a sixteen year old girl in order to get her "cooperation". (3) That he conducted the trials of petitioners in the press and over television. (4) That such public statements are intolerable—especially when they emanate from a lawyer or someone who represents the public interest. (5) Millsap used delaying tactics to prevent petitioners from discovering the charges against them. (6) That he deprived petitioners of their right not to give evidence by means of trickery and deception. (7) That Millsap struck many foul blows throughout the trials and by any means at his command, thereby depriving petitioners of a fair trial as guaranteed by the Constitution of the United States of America.

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[4] In Estes v. Texas, 85 S. Ct. 1628, Mr. Chief Justice Warren had this to say in a concurring opinion: "In **Lyons v. Oklahoma,** 322 U. S. 596, this Court held that if an involuntary confession is introduced into evidence the conviction must be reversed, even though there is other evidence in the record to justify a verdict of guilty."

III.

Appellants were denied their rights to a fair trial because of adverse publicity instigated in part by the "special prosecutor".

Appellants herein contend that they were deprived of their right to a fair and impartial trial because of a continuing torrent of adverse publicity, before, during and after their trials. **Shepherd v. Florida,** 71 S. Ct. 541; **Irvin v. Dowd,** 81 S. Ct. 1639. The existence of actual prejudice need not be proved by defendant. **Rideau v. Louisiana,** 373 U. S. 723; **Stroble v. California,** 343 U. S. 181; **Turner v. Louisiana,** 379 U. S. 466. The Supreme Court in **Estes v. Texas,** supra (1965), stated the following in reversing the conviction of Billie Sol Estes:

> "In this case it is even clearer that such a rule must be applied. In **Rideau, Irvin** and **Stroble,** the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings . . . Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in **In re Murchaison, Tumey, Rideau** and **Turner.**

> Such untoward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed."

Adverse publicity may prejudice a defendant's constitutional rights even when a case is tried before a judge without jury.[1]

This situation can be further aggravated when a Judge who issues an injunction is also the trial judge in contempt proceedings for its violation. And because judges are frequently the object of great pressures from the press, they have frequently held offenders in contempt of court. **Toledo Newspaper Co. v. United States,** 38 S. Ct. 560; **Bridges v. California,** 62 S. Ct. 190; **Pennekamp v. Florida,** 66 S. Ct. 102. In **Estes v. Texas,** supra, Justice Clark affirms this point:

> "Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressure that news media can bring to bear on them both directly and through the shaping of public opinion."

In light of the foregoing authorities it is clear that: (1) A defendant's right to a fair trial is constitutionally protected from adverse public comment. (2) The probability of prejudice is sufficient to gain a new trial—actual prejudice is not required. (3) Both judges and juries can be influenced by unfair pressures.

The following facts could be presented at an evidentiary hearing.

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[1] **The Public Trial and Free Press,** William O. Douglas, 33 Rocky Mountain Law Review 1, 2, 3 "Newspapers, radio and television are in the hands of men who have their own political philosophy and their own ideas as to what justice is and how it should be administered. Some newspapers dominate a community. When ownership of the paper is combined with ownership of the radio and television station, the community may become saturated with one point of view. We have had publishers who were tyrants and sought to impose their will on the courts as well as on the people. . . . Even federal judges who have life tenure may feel the lash of editorials demanding that cases be decided this way or that.

". . . At times the papers can help to arouse passions in a community so that no trial can be a fair one."

During the campaign for jobs at Jefferson Bank, CORE and petitioners were subjected to a continuing stream of public attacks by the local newspapers, television and radio stations. These attacks lasted throughout the trials and while petitioner's writs of habeas corpus were pending in the St. Louis Court of Appeals.

Statements were made by Mayor Raymond Tucker, Governor John Dalton, Donald Gunn, President of the Board of Alderman, State Senators Michael Kinney and Theodore McNeal, all of whom were influential political leaders (Ex. 1).

Between August 28, 1963, and January 16, 1964, the St. Louis Globe-Democrat (the city's only morning newspaper) printed 14 editorials and 17 separate smear articles denouncing and holding petitioners up to public ridicule (Ex. 1). Seven of these editorials and five smear articles were published in the Globe during the month of October, 1963. Two of them were captioned "Bank Demonstration Leader is Convicted Morals Offender" and "Move to Disbar CORE Lawyer Here". They were apparently timed to apply pressure on Judge Scott and to inflame the public against petitioners before sentencing on October 24, 25. The last ten smear articles entitled "Communism in CORE" beginning December 27, 1963, and ending January 5, 1964, were designed to influence the St. Louis Court of Appeals before their decision on petitioners' writs of habeas corpus on January 15, 1964. Almost all of these smear articles were prominently displayed on the front page of the Globe.

During the trial of petitioners in **Ford et al.**, the Globe, Post, Argus, and American published a large paid advertisement entitled "Facts on Jefferson Bank and Fair Employment". This ad sought to discredit petitioners and to mobilize public opinion on the side of the bank and against petitioners. It was printed **before** Judge

Scott had announced his decision in the three contempt cases.

Immediately after the Court sentenced petitioners on October 24, 25, defense counsel announced their intention to seek review of the convictions in the St. Louis Court of Appeals. In spite of the pending review and the fact that complaints had been filed with Mo. Bar against Curtis, Oldham and Howard, the executive committee of the St. Louis Bar Association authorized John Shepherd, president, to issue a press release denouncing what they termed petitioners' "lawlessness" and "contempt for the law" (Ex. 1). It is noteworthy that more than 10,000 serious crimes, including robbery, murder, rape and aggravated assault are committed in St. Louis every year; however, the St. Louis Bar with all its power, influence and prestige chose to direct its attack at petitioners. We have previously mentioned the public statements by Millsap under Point C, subsection II, supra.

Throughout the entire period before and during all three trials Judge Scott failed to take any action to curb Millsap or the press media. Comment about the pending cases was totally unhindered by any governmental or private authority. Judge Scott appointed Millsap as "special prosecutor" after a television appearance August 30, in which Millsap made a scathing attack on petitioners. (See footnote in Point C, subsection II, supra.)

In many cases it is difficult to ascertain what effect adverse publicity had on a particular trial. This case speaks for itself. We need only to look to the sentence of James Peake to arrive at a decision. Peake is a paraplegic. A wheel chair is his only means of locomotion. He was convicted of failing to wheel himself out of the bank. For this "crime" Judge Scott reserved his longest sentence, one year in a 4 x 8 cell at the City Jail. After these sentences were so outrageous that the Globe found it necessary to bolster Judge Scott's public image. On October 26, 1963, the Globe printed a feature article on the front page entitled "Judge Scott Is Man of Rare Ability". Two days later an editorial appeared with the caption "Kind of Judge He Is". The fact that bail for petitioners in **Curtis et al.** was set at $10,000 (bail set by U. S. Court of Appeals, 8 Cir., was $500.00 after conviction) and that Judge Scott refused to lower this figure even though petitioners voluntarily surrendered themselves into the custody of the Sheriff after reading about the attachment order in the newspaper (Tr. C, 22-25, 9/3/63); that he attempted to proceed to trial on September 3, without informing petitioners of the charges and without time to consult with counsel (Tr. C, 14-21, 9/3/63), leads to the inescapable conclusion that a formidable array of influential personalities and interest from the Governor to Millsap and from the Globe Democrat to the St. Louis Bar Association caused the trials of petitioners to be conducted in an atmosphere of tension and hostility which effectively deprived petitioners of a fair trial before a fair tribunal.[2]

IV.

Appellants in Ford et al. were never informed of the nature of the charges against them and this failure constituted a denial of due process under the Fourteenth Amendment.

An attachment order was filed against petitioners in **Ford et al.** on October 4, 1963. They proceeded to trial for contempt on the same date and the cause was continued until Monday morning. Millsap stated on Monday, October 7, that petitioners were being tried for civil contempt (Tr. F, 10). The order to show cause did not indicate even the approximate date on which the contempt was alleged to have occurred (Tr. F, 70-73, 10/4/63). No notice of contempt setting out specific acts constituting the contempt was filed. Judge Scott refused to inform defense counsel of the nature of the proceedings (Tr. F, 15-16). No special prosecutor was appointed by the Court. Petitioners were found guilty of criminal contempt and sentenced to long jail terms.

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[2] REPORT OF THE WARREN COMMISSION, The New York Times Edition, page 40:

> "(c) The numerous statements, sometimes erroneous, made to the press by various local law enforcement officials, during this period of confusion and disorder in the police station, would have presented serious obstacles to the obtaining of a fair trial for Oswald."

and at page 222:

> "The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime."

The right to know the charges against one is essential to due process of law. **United States v. Cruikshak,** 92 U. S. 542; **Gompers v. Buck's Stove Co.,** 221 U. S. 418, 31 S. Ct. 492. An accused contemnor is entitled to a notice which fully and fairly informs him of the specific acts of which he is charged; these standards of due process are obligatory on the states. **In re Oliver,** 333 U. S. 257; **In re Green,** 369 U. S. 689. (For the completion of this argument please see subsection II of Point E.)

D.

The District Court erred in holding that the conviction of appellants and sentences imposed without jury trial was not a denial of due process under the Sixth, Fourteenth and Eighth Amendments.

I.

Missouri law denies a jury trial to persons accused of criminal contempt and appellants have not waived their right to assert their claim here.

Petitioners in **Curtis et al., Ford et al.,** and **Grand et al.,** were sentenced by the Circuit Court of St. Louis to long jail terms ranging from 60 days to (1) year and fined $500-$1,000 dollars plus cost of court. These petitioners were tried, convicted and sentenced by Judge Michael J.

Scott of the St. Louis Circuit Court without benefit of a jury trial. At the time these cases were pending before the Circuit Court no request for a jury trial was made by petitioners. Furthermore, it would have been useless for petitioners to request a jury because Missouri law denies this right to a person accused of contempt of court. **State v. Shepherd,** 76 S. W. 79; **DeMay v. Liberty Foundry Co.,** 37 S. W. 2d 648, and upon conviction the Judge may sentence the offender to an unlimited jail term or levy an unlimited fine or both in his discretion.[1]

Whether or not petitioners have waived their right to allege lack of due process on the ground of the excessive length of their sentences without benefit of a jury trial is the first matter for consideration. The United States Supreme Court has settled this point in **Green v. United States,** 78 S. Ct. 632, at page 645 where the Court explicitly considered petitioners' right to a jury trial even though "petitioners themselves have not contended that they were entitled to a jury trial". Also see **United States v. Barnett,** 84 S. Ct. 984, 1012, footnote No. 7 (dissenting opinion). In view of the severity of the sentences and the fact that the judge who issued the injunction also tried the contempt cases in which petitioners had no statutory or constitutional right to a jury under Missouri law, it would seem that justice would require that this issue be adjudicated here.[2]

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[1] **Missouri Revised Statutes** 1959, Sec. 476.120.

[2] In **Patterson v. Alabama,** 294 U. S. 600, Mr. Chief Justice Hughes stated the rule as follows: "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require the Court is bound to consider any change either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case". 294 U. S. at 607. This quotation was used in the 1964 case of **Robert Mack Bell v. State of Maryland,** 84 S. Ct. 1814.

II.

The severity of sentences that were imposed or could have been imposed according to Missouri law required that petitioners be granted a jury trial pursuant to the Sixth and Fourteenth Amendments to the Federal Constitution.

It has been held by the United States Supreme Court and many state supreme courts, that one charged with criminal contempt has no constitutional right to a jury trial. **Green v. United States,** 78 S. Ct. 632 (5-4 decision); **United States v. Barnett,** 84 S. Ct. 984 (5-4 decision). However in recent years the punishment meted out for criminal contempt has increased far beyond the trivial sanctions which judges had heretofore imposed. In **United States v. Barnett,** supra, Justice Goldberg said at page 1018 (dissenting opinion):

> "3. Criminal Contempt in Recent Years.
>
> There has been a dramatic increase in recent years in the severity of the punishment imposed in the federal courts without trial by jury for criminal contempt. For example, in **Green v. U. S.,** supra, and **Collins v. U. S.,** 269 F. 2d 745, sentences of imprisonment for three years were imposed; in **Piemonte v. U. S.,** 367 U. S. 556, a sentence of imprisonment for 18 months was imposed; in **Brown v. U. S.,** 359 U. S. 41, a sentence of imprisonment for 15 months was imposed; in **Nilva v. U. S.,** 352 U. S. 385, a sentence of imprisonment of one year and a day was imposed; and in **Levine v. U. S.,** 362 U. S. 610, a sentence of imprisonment for one year was imposed."
>
> "4. Historical Conclusions.
>
> The available evidence seems to indicate that (a) at the time of the Constitution criminal contempts triable without a jury were generally punishable by

trivial penalties and that (b) at the time of the Constitution all types of 'petty' offenses punishable by trivial penalties were generally triable without a jury. This history justifies the imposition without trial by jury of no more than trivial penalties for criminal contempts.''

The sharp increase in the punishment for criminal contempt also caused the majority of the Supreme Court to take a new look at contempt punishment in **Barnett,** supra, where the court ruled 5-4 that Ross Barnett had no constitutional or statutory right to a jury trial. However in denying Barnett's right to a jury the Court majority cautioned that imposition of severe punishment without benefit of a jury would be a violation of defendants' rights under the Sixth Amendment. In footnote 12 at page 992 Justice Clark speaking for the Court added the following dictum:

> ''In view of the impending contempt hearing, effective administration of justice requires that this *dictum* be added. Some members of the Court are of the view that without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses.''

It is in the light of **Barnett** that the right of petitioners to a jury trial under the Sixth and Fourteenth Amendments to the U. S. Constitution must be viewed.[3] The quantum of punishment either by fine or imprisonment constituting a petty offense has already been settled by the Supreme Court. In **District of Columbia v. Colts,** 51 S. Ct. 52, the Court held that the offense of **reckless driving** carrying a fine of ''not less than **$25 nor more than** $100 or imprisonment not less than **10 days nor more than 30 days, was a grave offense entitling the defendant**

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[3] See footnote No. 2, supra.

to a jury trial. Also see **District of Columbia v. Clawans,** 57 S. Ct. 660. Furthermore it is clear from current legislation that the United States Congress considers only fines and jail sentences of $300 or less and 45 days or less respectively, as "petty" and not requiring a jury in criminal contempt.[4]

In the instant cases all petitioners were fined $500— or more and received jail terms of 60 days or more. It follows then, that these sentences were not those provided for petty offenses and therefore petitioners were entitled to a jury trial pursuant to the Sixth Amendment of the U. S. Constitution which states in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

The Supreme Court has recently made the Sixth Amendment rights and standards obligatory on the states and essential to due process of law under the Fourteenth Amendment. **Gideon v. Wainwright,** 83 S. Ct. 792; **Pointer v. Texas,** 85 S. Ct. 1065 (1965); **Douglas v. Alabama,** 85 S. Ct. 1074 (1965).

In order to preserve our cherished liberties, the right to a jury trial in all criminal prosecutions must be made inviolate, especially where severe punishment can be administered.

In **Green v. United States,** supra (dissenting opinion), Justice Hugo Black eloquently summarizes the dangers inherent in trials without recourse to the jury. He states at page 651:

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[4] The Civil Rights Act 1957, 42 U. S. C. A. 1995, provided in part: "Provided further, however, that in the event such proceeding for criminal contempt be tried before a judge without jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefore shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases."
In addition the Civil Rights Act of 1964 limited the punishment for criminal contempt to $1,000 fine and 6 months in jail and grants the defendant an **absolute right to a jury trial no matter what the punishment.**

> "When the responsibilities of lawmakers, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. In the words of this Court: 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. * * * Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

III.

The fines and jail sentence assessed against James Peake constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

James Peake is a paraplegic with a wheel chair as his only means of locomotion. He was present in the bank for about five minutes after he was requested to leave. His sentence was a $500.00 fine and one year in the City Jail. At this time he has served fifty-five days of this sentence. Because of his disability he must be lifted in and out of his bed since the wheel chair would not fit in the cell. He required assistance to use the toilet facilities and was entirely dependent upon other prisoners for these services.

Whether a punishment is cruel and unusual or inhuman is not an abstract question, but is properly decided upon the facts of each case. **Robinson v. California,** 82 S. Ct. 1417. Under the circumstances of appellant's disability and the conditions of his imprisonment the fine and sentence constituted a denial of his rights under the Eighth Amendment of the United States Constitution.

E.

The District Court erred in holding that appellants in Ford et al. and Grand et al. were bound by a judgment rendered in earlier litigation to which they were not parties, privies or members of a class.

I.

A person must be a party or in privity with a party in order to be bound by an injunction or any other judgment in personam.

On the 25th of October, 1963, the Circuit Court of the City of St. Louis found petitioners in **Ford et al.** and **Grand et al.** guilty of criminal contempt of court for violating an ex parte injunction issued on August 30, 1963, against Robert B. Curtis, William L. Clay, Charles R. Oldham, Lucian Richards, Richard Daly, Walter Hayes, Rev. Charles Perkins, Norman Seay, Herman Thompson, Melvin West, individually and as representatives of a class known as St. Louis Committee of Racial Equality, Cause No. 57,945. These petitioners were neither parties to the injunction suit nor were they members of St. Louis CORE. It was never alleged nor did the Court make a finding of fact that these petitioners were members of CORE or parties to the restraining order, and yet all petitioners were found guilty of contempt of court and sentenced to jail terms from 60 days to one (1) year in the City Jail and fined $500 dollars each. It is clear that the St. Louis Circuit Court injunction only purported to bind the named defendants and members of CORE.

It is the very essence of due process that a person has a right to be heard before his legal relationships were determined by a court. This right applies to all actions in personam in law and equity. **Pennoyer v. Neff,** 95 U. S. 714, 24 L. Ed. 565; **Mullane v. Central Hanover Bank and Trust Co.,** 339 U. S. 306, 70 S. Ct. 652; **Gorka v. Gorka,** Mo., 295 S. W. 515. Courts have no power to affect the legal relationships of persons not parties to an action or in privity with parties and a decree issued against one over whom the court lacks jurisdiction is of no effect. **Harris v. Hardeman,** 14 Howard 334; **Webster v. Reid,** 11 Howard 437; **Hansberry v. Lee,** 61 S. Ct. 115. It is quite apparent then that petitioners in **Ford et al.** and **Grand et al.** were not bound by the injunction issued by the St. Louis Circuit Court because they were not parties to the decree. This is a principle of general application in Anglo-American jurisprudence.

Furthermore a judgment of a state court if obtained without due process over defendants in personam may be collaterally attacked either defensively or aggressively. **Essanay Film Mfg. Co. v. Kone,** 42 S. Ct. 318; **Kilbourn v. Thompson,** 103 U. S. 168. The United States Supreme Court covers this point exhaustively in **Hansberry v. Lee,** 61 S. Ct. 115, where the court reversed the judgment of the Illinois Supreme Court which had upheld a decree enforcing a restrictive covenant against a person not a party to the agreement. The court said at page 117:

"But when the judgment of a state court ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process **it becomes the duty of this Court to ex-**

> **amine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Life Indem. Co. v. Rupp,** 235 U. S. 261, 273, 35 S. Ct. 37.
>
> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. **Pennoyer v. Neff,** 95 U. S. 714, 24 L. Ed. 565; **Freeman on Judgments,** 5th Ed., Sec. 407. A Judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. Sec. 905, 28 U. S. C. 687, 28 U. S. C. A. 687, prescribe (citing cases) **and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires. Postal Telegraph Cable Co. v. Newport,** 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215; **Old Wayne Mut. L. Ass'n v. McDunough,** 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345." (Emphasis supplied.)

Therefore the modern doctrine is that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry when the judgment is relied on in any other proceeding. This doctrine has uniformly been held to apply to injunctions and contempts of court based on violation of an injunction. Judge Learned Hand for the court in **Alemite Mfg. Corporation v. Staff,** 42 F. 2d 832, voided a judgment wherein a stranger was convicted of contempt for violating an injunction to which he was not a party. The Court said at page 833:

"On the other hand no Court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it; it is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service and who therefore can have their day in court.

. . . Upon proceeding to punish for contempt the propriety of the decree is not open, even though, it be founded upon an unconstitutional statute (sic). The respondent may only deny any knowledge of the decree, or that his act was within it. The unlawfulness of his conduct has been determined, **and if he has not been a party and he has had no day in court, he is condemned without hearing.** It is by ignoring such procedural limitations that the injunction of a court of equity may slow steps to be made to realize the worst fears of those who are jealous of its prerogative. The District Court had no more power in the case at bar to punish the respondent than a third party who had never heard of the suit." (Emphasis supplied.)

It should be noted that in **Alemite Mfg. Corp. v. Staff,** supra, a decree was entered against John "his agents, employees, associates and confederates" enjoining them from "infringement". Joseph, the person convicted of contempt, was a salesman for John at the time the decree was issued, but quit before being charged with contempt. The fact that he knew of the injunction was never doubted; but even though committing certain acts that would have been violations if he had been a party, the Court held that in reality the injunction was not violated since only a person bound by an injunction can do so. See **United Pharmacal Corp. v. U. S.**, 306 F. 2d 515, 97 A. L. R. 2d 485.

The authorities seem to be unanimous that injunctions may not be enforced in state or federal courts against those who are not parties thereto. **Scott v. Donald**, 165 U. S. 107, 17 S. Ct. 262. The United States Supreme Court has upheld this position many times. In **Regal Knitwear Co. v. NLRB**, 65 S. Ct. 478, the Court said at page 481:

> "The courts nevertheless may not grant enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. **Chase National Bank v. Norwalk**, 291 U. S. 431, 436, 437, 54 S. Ct. 475, 477, 78 L. Ed. 894; **Hitchman Coal and Coke Co. v. Mitchell**, 245 U. S. 229, 234, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497 Ann. C, s. 1918B, 461; **Scott v. Donald**, 165 U. S. 107, 117, 17 S. Ct. 262, 265, 41 L. Ed. 648; **Alemite Mfg. Corp. v. Staff**, 2 Cir., 42 F. 2d 832."

And the famous case of **United States v. United Mine Workers of America**, 67 S. Ct. 677, a case that has been cited frequently in support of the court's broad power to punish for contempt, the words make it quite clear that only **parties** are to be the subject of judicial enforcement of court orders, the court said at page 696:

> "Proceeding further, we find impressive authority for the proposition that an order issued by a court with **jurisdiction over the subject matter and person** must be obeyed by the **parties** until it is reversed by orderly and proper proceedings" (Emphasis supplied).

Thus far we have seen that the petitioners in **Ford et al.** and **Grand et al.** were not parties to the injunction suit nor members of CORE and therefore were not bound by the injunction issued in **Jefferson Bank and Trust Com-**

pany v. Curtis et al. on August 30, 1963. If these petitioners are to be held as guilty of contempt of court it must be on some theory other than that they were bound by the injunction and violated it.

II.

A stranger cannot be adjudged in contempt of court for violation of an injunction unless he acts in concert with a person who is a party to the injunction.

It is a generally accepted rule of law that a stranger or a person not bound by an injunction may be convicted of contempt of court if he aids or acts in concert with one who is bound by the injunction. **Ex parte Lennon,** 166 U. S. 548, 17 S. Ct. 658. **United Pharmacal Corp. v. United States,** 306 F. 2d 515, 97 A. L. R. 2d 485; **Alemite Mfg. Corp. v. Staff,** supra. In **United Pharmacal Corp. v. United States,** the Court said at pages 517, 518:

> "The question is whether United and its officers aided and abetted Melabolic in violating the preliminary injunction for as the late Judge Learned Hand pointed out in **Alemite Mfg. Corp. v. Staff,** 42 F. 2d 832 (C. A. 2, 1930), 'the only occasion when a person not a party may be punished is when he has helped to bring about not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant (i. e., the person enjoined) or must be legally identified with him.' Wherefore as Judge Hand went on to point out, **if the person enjoined is not involved in the contempt, an employee, and by the same token one in active concert or participation, cannot be either, because the decree has not been violated. The reason for this is clear: '. . . for it is not the act described which the decree may forbid, but only that act when the defendant does it.'**

> Ibid. See also **Reich v. United States,** 239 F. 2d 134 (C. A. 1, 1956), cert denied, 352 U. S. 1004, 77 S. Ct. 563, 1 L. ed. 2d 549 (1957)" (Emphasis supplied).

It should be noted here that on October 4, 1963, and October 7, 1963, when petitioners in **Ford et al.** and **Grand et al.** respectively were cited for contempt, none of the defendants in **Jefferson Bank v. Curtis et al.** were accused of violating the injunction on either of those two days. It is perfectly true that 8 persons plus their attorney were cited on August 30, 1963, but there was no connection between the three separate cases and no complicity was alleged. However, Judge Scott in his Finding of Fact and Judgment, ruled that **Ford et al.** and **Grand et al.** acted in concert with **Curtis et al.** This ruling was made even though all the evidence showed that **Ford et al.** and **Grand et al.** acted independently of **Curtis et al.** and at different times. Also there were no allegations of this nature contained in the Order to Show Cause (Tr. F, 70-73; 10/4/63) or Notice (Tr. G, 8-10; 10/7/63). The pertinent part of this Finding of Fact and Judgment reads as follows:

> "It is further found that Michaela Grand, with actual notice as aforesaid and acting in concert and participating with and aiding and abetting one or more of the persons named as defendants in the aforesaid **Jefferson Bank and Trust Company v. Robert Curtis et al.,** did wilfully disobey and violate said Restraining Order by:"

Petitioners were found guilty of aiding and abetting violation of the restraining order but were never accused of doing so in the order to show cause or notice of contempt. Petitioners did not have an opportunity to defend against that specific finding of fact since it was not alleged. Even in the Finding of Fact Judgment the petitioners were not informed of the name or the identity of the persons they are supposed to have aided and abetted or the manner in which the enjoined persons acted in concert with them. Nor is any explanation given as to how these petitioners could be guilty of aiding and abetting when none of the persons bound by the injunction was accused of violating the injunction on October 4th or 7th. See **Scott v. Donald,** supra; **Alemite Mfg. Corp. v. Staff,** supra.

The right to know what one is charged with is a generally accepted rule of law and is essential to due process. This principle applies to cases of criminal contempt; therefore an alleged contemptor is entitled to a notice which fairly and fully informs him of the specific acts of contempt of which is charged. **G. v. Souder,** Mo. App., 305 S. W. 2d 883; **U. S. v. Cruikshank,** 92 U. S. 542; **Gompers v. Buck's Stove etc. Co.,** 221 U. S. 446, 31 S. Ct. 492.

A petition (order to show cause or notice) in criminal contempt is insufficient as a matter of law if it does not allege how the alleged contemnor acted in concert and participated with the enjoined defendants in violating the restraining order. **United States v. Dean Rubber Mfg. Co.,** 71 F. Supp. 96; these standards of due process apply to the states. **In re Oliver,** 333 U. S. 257; **In re Green,** 369 U. S. 689.

It goes without saying that "acting in concert and aiding and abetting" are the most important factors in these contempt cases, because, if proved, they provide the only legal and factual basis upon which convictions of a stranger to the decree can be based. Since petitioners were not accused of aiding and abetting anyone they were not fully informed of the charges against them and did not know what to defend against. Therefore the order to show cause in **Ford et al.** (Tr. F, 70-73), and notice in **Grand et al.** (Tr. G, 8-10), are fatally defective in that they fail to state grounds upon which a stranger can be found guilty, and the fact that Judge Scott made a finding of "acting in concert" is of no avail because it constitutes a judgment of guilt without evidence to sustain it and without notice of the charges to the accused.[1] **Thompson v. City of Louisville,** 80 S. Ct. 624.

F.

The District Court erred in its holding that impairment of contractual obligations and the right to specific findings by the trial court were not rights protected by the Federal Constitution.

I.

The Missouri courts construed the jurisdictional indemnity bond so as to impair contractual obligations directly affecting these appellants.

Under Section 526.070, Mo. Statutes, 1959, no injunction may be issued except on final hearing or judgment unless a bond be provided for any party interested in the subject matter. The injunction bond as posted by the plaintiff in Jefferson Bank and Trust Co. v. Curtis et al. does not cover the appellants "individually and as representatives of a class known as St. Louis Committee of Racial Equality" as ordered in the restraining order.

The Missouri Statute requiring a bond in injunction cases goes back to 1835. The bond is jurisdictional in all such cases, except those which are specifically exempted by the statute. The trial court, the St. Louis Court of Appeals in its opinion, and the Supreme Court of Missouri in its adoption of the opinion of the St. Louis Court of Appeals read into the bond additional parties. This action by the Court abridged the obligation of the indemnity contract between the obligor Bank and its obligee surety by adding indemnities (third party beneficiaries) not contracted for by the parties and previously limited by the trial court in its restraining order "to all defendants individually and as representatives of a class known as St. Louis Committee of Racial Equality: from * * *"

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[1] The United States Supreme Court has held that it does not need to accept the state court finding of fact. In **Milk Wagon Drivers Union v. Meadowmoor Dairies,** the Court said: "Here again, the state courts have not the last say. They must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716." 61 S. Ct. 552, at page 557.

The St. Louis Court of Appeals misapplied the rule which reads into a bond the terms of the statute. This rule applies to the conditions of the bond and not the parties. 12 Am. Jur. 2d 326, p. 495 (Bonds). By their judicial interpretation of R. S. Mo. 1959, Section 526.070, the Missouri Courts acted in violation of Article I, Section 10 of the Constitution of the United States and the Fourteenth Amendment thereto.

II.

The law requiring specific findings of the acts determined by the trial court to be contemptuous was discriminatorily applied and enforced against these appellants in violation of Fourteenth Amendment rights.

It is a well settled principle of law in Missouri, by both statute and decisions of the courts, that in contempt of court proceedings the findings of fact upon which the judgment of guilty and the commitment order are based must recite the facts and circumstances constituting the offense with great particularity in order to be effective to coerce, or to punish the contemnor for his violation of the court's order (Rule 35.01; Section 476.140, R. S. Mo. 1959; **Glenn v. Hendrix,** 349 S. W. 2d 532, and cases therein cited). The principle is well stated in **Ex parte Fuller,** 50 S. W. 2d 654, 657, as follows:

> ". . . In contempt proceedings which result in detention of one's liberty, the law says that the facts and circumstances of the contumacious acts must be spread of record in the commitment or order of commitment. Such was not done here and petitioners' legal rights have been invaded. . . ."

The specific facts upon which the conclusions or fact or law are based must be "found" by the court and spread upon the record of the court in its Findings of Fact and Commitment Order. A court of general jurisdiction can only speak through its records. (**Odom v. Langston**, 213 S. W. 2d 948, 950.) It goes without saying that where its records are silent, it says nothing; and where its records are erroneous, it does not tell the truth. Supreme Court Rule 35.01, which controls the procedure in criminal contempt, provides, in the last sentence, that ". . . upon finding a guilt the courts shall enter an order reciting the essential facts constituting the criminal contempt and fixing punishment."

The pertinent statute, Section 476.140, R. S. Mo. 1959, provides:

> "Whenever any person shall be committed for any contempt specified in Sections 476.010 to 476.310, the particular circumstances of his offense shall be set forth in the order or warrant of commitment."

The construction of these sections has been most amply stated as follows:

> "Our appellate courts have held repeatedly that in a contempt proceeding, that facts and circumstances constituting the offense, and not simply legal conclusions, must be recited not only in the judgment . . . but also in the commitment, regardless of whether the charged contempt is direct, i. e., arising out of conduct or action in the presence of the court . . . or, as here, as indirect, i. e., arising out of conduct or action outside the presence of the court. . . ." **Glenn v. Hendrix**, 349 S. W. 2d 532, 533. See also, **Osborne v. Purdome**, 244 S. W. 2d 1005, 1011, citing Section 476.140, R. S. Mo. 1949.

A reading of the Court's Findings of Fact and Judgments, and Commitment Orders, state such general conclusions that it is impossible to know with particularity what specific facts are relied upon to formulate the charges, what specific facts are relied upon to prove the charges, and what specific facts are relied upon to assess the punishments. As such, the Findings of Fact and Judgments, and the Commitment Orders are fatally defective and legally insufficient to serve the purpose for which they are intended. (**Scott v. Davis**, 328 S. W. 2d 394, 396.)

The rule requiring specific findings was uniformly applied in Missouri until the instant case. The discriminatory application of this rule against these appellants violates their 14th amendment rights.

G.

The District Court erred in its holding that an evidentiary hearing was not required.

After these cases had been remanded by the Eighth Circuit for consideration of the question as to whether an evidentiary hearing would be held a pre-trial conference was held in the chambers of Judge Meredith. Appellants requested an opportunity to present additional evidence to develop fully the issues of (a) existence of a labor dispute and unfair labor practices, (b) extent of bias, prejudice and interest of the "special prosecutors", and (c) acts of discrimination practiced by the Jefferson Bank.

Substantial and essential facts are in dispute. The existence of a labor dispute, acts of racial discrimination and unfair labor practices are charged by appellants and denied by the Bank and the respondent herein. At the hearing before the state trial court appellants were precluded from introducing evidence surrounding acts of discrimination, unfair labor practices and the economic factors and other matters affecting the question of a labor dispute. Appellants were not permitted to introduce evidence of the extent of bias, prejudice and interest of the special prosecutors and to inquire into their activities which prevented appellants from receiving a fair trial. Appellants have filed with this brief two exhibits which are not a part of the record in either the state trial court or the District Court. The matters contained in these exhibits could be fully developed at an evidentiary hearing. The determination of these facts raised by the pleadings is essential to determine the issues in this case. Under the doctrine of **Townsend v. Sain**, 83 S. Ct. 745, the District Court was required to hold an evidentiary hearing.

CONCLUSION.

It is, therefore, respectfully submitted that the orders rendered herein by the District Court denying the writs of habeas corpus sought by appellants should be set aside and the writs ordered to issue or that this cause should be remanded to the District Court for an evidentiary hearing.

Respectfully submitted,

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New York 38, New York

Dear Carl-

I am enclosing our last tribulation in the long list of tribulations which we have encountered in the Jefferson Bank case. The interesting aspect of the court's ruling is the fact that the court issued its ruling without a hearing.

Such is life in Missouri. I am sending two copies of the court's memorandum for your study.

Very truly yours,
Charles R. Oldham
Charles R. Oldham

CRO/m

enclosure

Curtis, v. Boyer

July 14, 1965

Charles Oldham, Esq.
706 Chestnut
Room 326
St. Louis, Missouri

Robert B. Curtis, Esq.
2847 Union Boulevard
St. Louis, Missouri

Dear Charlie and Bob:

Thank you for a copy of your very excellent brief. You both ought to know that I referred to this case in testimony but I do not recall whether by name or not, when I testified before Senator Ervin's Subcommittee on the Judiciary, recently. He has a very fine bill on bail but one of the paragraphs gives a judge too much power to punish for contempt. In the course of discussing this section I naturally discussed Barnett and indicated that I thought Barnett was wrong and that we had a case coming up from St. Louis, which in my view, would cause the Supreme Court, if the case got that far, to look again at its decision in Barnett.

You have listed five attorneys, of counsel. I would like to include all of them on our list of attorneys who receive mail and other communications from time to time. Can you send me their addresses and telephone numbers. I would be more than appreciative.

I look forward to seeing you both very soon. With best regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/os

S SED FRE FORTSON, JAMES, VS. HATCHCOCK, ROBERT, W. SHERIFF GADSEN COUNTY, FLORIDA 1966

Box 36
Folder 31

State Historical Society Of Wisconsin

Please Retain Original Order

APR 27 1966

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
FLORIDA-TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. HATHCOCK, individually, and
as Deputy Sheriff of Gadsden County,
Quincy, Florida, et al.,

Defendants.

ORDER ON MOTIONS OF DEFENDANTS, JOINTLY AND SEVERALLY, TO DISMISS COMPLAINT

This cause having been heard on April 14, 1966 upon the Defendants' joint and several Motions to Dismiss the Complaint in this cause and the Court having heard argument of counsel for the respective parties, it is, upon consideration,

ORDERED, ADJUDGED AND DECREED as follows, to-wit:

1. That the Complaint be, and it is hereby, dismissed as a Class action.

2. That the Complaint be, and it is hereby, dismissed insofar as it seeks to enjoin the enforcement of Section 856.01 F.S. and Sections 950.05 through 950.08 F.S.

3. That the Complaint, upon Motion of Plaintiff, is amended to the extent that wherever Section 847.06 F.S. is mentioned there is substituted in lieu thereof Section 847.04 F.S.

4. That the Complaint be, and it is hereby, dismissed with respect to Section 847.04 F. S.

5. That the Complaint be, and it is hereby, dismissed as to the Defendants, A. B. Blackburn and the Board of County Commissioners of Gadsden County, Florida.

6. That portion of the Complaint alleging the delivery of Plaintiff by Defendant Hathcock to Defendant Summerford and Defendant Summerford taking Plaintiff into custody and holding him, all done in their respective official capacities pursuant to Order of the Justice of the Peace Court be, and the same is hereby stricken.

7. That Deputy Sheriff Hathcock and the Superintendent of the Gadsden County Prisoner Stockade Summerford are immune as to the acts allegedly committed by them or either of them in their official capacity under the Order of the Justice of the Peace Court, executing the Orders of such Court, but not as to the alleged discriminatory acts while in his custody.

8. Answers are required only for Sheriff Edwards, Deputy Sheriff Hathcock and W. A. Summerford the Superintendent of the Prison Camp. Such answers are only required to meet the allegations of the Complaint as modified by the provisions of this Order. Such Defendants are allowed 30 days from April 14, 1966 within which to file such answers.

DONE ANDORDERED in Chambers at ~~Tallahassee~~ Marianna, Florida, this 26 day of April, 1966.

G. HARROLD CARSWELL

G. HARROLD CARSWELL
United States District Judge

[illegible]N.2 1966

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF FLORIDA TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. HATCOCK, et al.,

Defendants.

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF GADSDEN

ALTON M. TOWLES being by me first duly sworn deposes and says that he is the attorney for the Defendants in the above entitled cause; that on the 29th day of April 1966 he did mail to John D. Due, Jr., 540 1/2 West Brevard Street, Tallahassee, Florida, the attorney for the Plaintiff in the above entitled cause, a true and complete copy of NOTICE OF TAKING DEPOSITION OF PLAINTIFF ON ORAL EXAMINATION (the original of which has been filed with the Clerk of the above named Court) enclosed and securely sealed in an envelope bearing the requisite amount of uncancelled United States postage stamps to insure its delivery to addressee, which envelope was addressed as follows:

John D. Due, Jr.
540 1/2 West Brevard Street
Tallahassee, Florida

by depositing said envelope, properly sealed, stamped and addressed as aforesaid, in the United States post office in the City of Quincy, Florida.

Alton M. Towles

Sworn to and subscribed
before me this 31st day
of May, A. D. 1966.

Laura Belle Edwards

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JAN. 20, 196[illegible]

I DO CERTIFY, That copy hereof has been furnished to JOHN D. DUE, JR., 540 1/2 West Brevard Street, Tallahassee, Florida, by mail this 1st day of June, A. D. 1960.

ATTORNEY

MAY 2 1966

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
FLORIDA-TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. HATHCOCK, et al.,

Defendants,

NOTICE OF TAKING DEPOSITION OF PLAINTIFF ON ORAL EXAMINATION

TO: James Fortson, Plaintiff, and his attorney, John D. Due, Jr., 540 1/2 West Brevard Street, Tallahassee, Florida.

You are hereby notified that on the 11th day of May, 1966 at 2:30 o'clock P. M. in the court room of the Gadsden County Court House in Quincy, Florida before Miss Frances Thigpen, a Notary Public, or some other duly qualified officer, who is not a relative, employee, attorney or counsel of any of the parties and who is not a relative or employee of any such attorney or counsel and is not interested financially in the action, the Defendants will take the deposition of the Plaintiff, JAMES FORTSON, by oral examination for the purpose of Discovery or use as evidence in this action, or both, under the rules of civil procedure for the United States District Courts. The oral examination will continue from day to day until completed.

The Plaintiff is hereby notified to be present and available for such examination at such time and place.

Alton M. Towles

ALTON M. TOWLES
Attorney-at-Law
Box 367
Quincy, Florida
Attorney for Defendants

I DO CERTIFY, That copy hereof has been furnished to JOHN D. DUE, JR. 540 1/2 West Brevard Street, Tallahassee, Florida, by mail this 27 day of April, A. D. 1966.

Alton M. Towles

ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

vs.

ROBERT W. HATHCOCK, et al.,

Defendants.

AFFIDAVIT OF ROBERT W. HATHCOCK

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF GADSDEN

ROBERT W. HATHCOCK, being by me first duly sworn, deposes and says;

That I am now, and have been, continuously, for more than seven months immediately prior to the date of this affidavit, a duly appointed, qualified and acting Deputy Sheriff of Gadsden County, Florida; that I have personal knowledge of the facts, matters and things set forth in this affidavit.

That this affidavit is submitted in support of the MOTION OF DEFENDANTS, ROBERT W. HATHCOCK AND OTHO EDWARDS, JOINTLY AND SEVERALLY FOR FINAL SUMMARY JUDGMENT in their favor jointly and in favor of each of them severally in this cause for the purpose of showing that there is no genuine issue as to any material fact and that the moving parties are, and each of them is, entitled to such judgment as a matter of law.

On the night of November 19-20th, 1965 I was engaged in my official duties as Deputy Sheriff of Gadsden County, Florida, and was working in and around, and patrolling, the area over in the Havana section of Gadsden County, Florida and was driving on U. S. Highway #27 just South of Havana in what is sometimes called the "Rich Bay Section" of the County and just as I started to pull off of U. S. Highway #27 I noticed that a couple of Negroes were standing on the side of the highway so I decided to stop and check them to see who they were. I stopped my car near them and I recognized one of them as James Faison. He had not been out of the Gadsden County Jail very long, probably not much over a week if any, since he had been let out of said jail. I talked to him and asked him if he didn't think he had drunk a little too much to be out on the streets walking on a highway like that; he said "No Sir. I don't think I've had too much to drink". So I talked with him a few minutes and told him he had just got out of jail and I hated to put him back in jail and asked him if he would go on home if I would let him go. He said "Yes Sir." At that time it was my firm opinion that he was drunk from the use of intoxicating liquors. I have been a law enforcement officer for a number of years. Prior to becoming a Deputy Sheriff I worked with the City Police Department of the City of Quincy for approximately 3 1/2 years and I have been a Deputy Sheriff for more than the last past seven months; Prior to this time I spent 6 years active duty in the army during which I saw a good bit of drinking of alcoholic liquors and beverages and saw a good many people drunk from the use thereof and in my opinion I am qualified to know a drunk when I see one and qualified to know whether or not a person is drunk from the use of intoxicating liquors or beverages. During my years as a law enforcement officer and during my period of service in the army I have been around a lot of different people at a lot of different times and places when they were drinking intoxicating liquors and beverages and I have been around the same people at other times when they had not been drinking same and it is my opinion that I know the difference between a person that is drunk as a result of being under the influence of intoxicating liquors and one who is not; there was another Negro with James Fortson at the time but I don't remember his name I believe it might have been a man by the name of Robert Brown from Tallahassee but I'm not sure. It might have been one of the McCree boys but if it was I'm not sure which one it was; James Fortson told me that he would go on home anyway; said they had given out of gas; that the car had given out of gas and they were waiting on them to go to town and get some gas for the car; I did not see any car at this time. James Fortson said they were trying to get the car cranked and some other boys were just up the road with it; about that time a 1955 or 1956 model Oldsmobile came out from towards Havana headed South on U. S. Highway #27 and they said that was the car they were supposed to be in. I told them to go ahead and get in the car and go on home; James Fortson said he would. When I first noticed James Fortson he was standing on the shoulder of U. S. Highway #27. When my lights hit him he kind of walked down the side of the road there like he was staggering pretty bad and well intoxicated; he and the other party went ahead and got in the car and they left going back towards Havana. I worked around Havana for a while checking a juke joint or two over there, went by one which is known as Lightning's Place And everything seemed pretty quiet. Later on that same night, sometime after midnight, I observed the same Oldsmobile heading towards Tallahassee or going South on U. S. Highway #27, South of Havana, so I pulled my car in behind it and followed it as it seemed to me it was being driven pretty rapid; I decided to check on the speed of the car and followed it from approximately the South City Limits of Havana to the paved road that turns off of U. S. Highway #27 back towards Scotland in Gadsden County which is a distance of several miles; the car was traveling at an average speed of 75 to 80 miles per hour so I stopped the car. I knew it was the same car that I had seen James Fortson get in earlier that night when he was supposed to go home. When I stopped the car I found that it was a McCree Negro that was driving and I asked him for his license; he had his license. I explained the violation of the speed limit to him, told him how fast he was driving and also advised him he was under arrest for speeding, asked him if he had $35.00 to post a bond with and he said he didn't, so I told him he was going to have to go to jail, I would have to carry him to jail because he couldn't post a bond. He said that was all right. I also noticed and called to his attention that although he had a Florida drivers license he was operating the car with a Georgia tag and I told him I was going to have to check on the tag because if he lived in Florida, operating a car in Florida with a Georgia tag, he was violating the law on the tag situation. He said the car belonged to his brother and his brother lived in Georgia at the time which I found out later to be true.

Lee McCree was the name of the operator of the car whom I arrested for speeding. Before I put him in my car I asked him if he had ever carried James Fortson home. He said "No sir, he is still in the car, he wouldn't go home". He said he tried to get him to go on like I had told him to do. I told him to tell James Fortson to get out of the car as I wanted to talk to him again. James Fortson got out of the Oldsmobile along with two other Negroes. I explained to James Fortson again that I had given him a chance to go home and get off the streets as in my opinion he was too drunk to be out on the streets at that time. In my opinion he was still drunk from the use of intoxicating liquors. I placed him under arrest and told him I was going to have to carry him to jail. He said "No. You can't do that". I said yes James I already got you under arrest. I opened my car door and told him to get in because I didn't want any trouble with him. I told him I tried every way I could to avoid any trouble with him and he wouldn't go home so there wasn't nothing left for me to do but to do my job. He said "Well, I'm not going no Goddamn wheres with you or nobody else". I said Yeah you are going if I have to put you in there myself, I'm going to carry you. He said "No sir. You are not going to do that". So I grabbed at him on his shoulder when I did that he grabbed my arms, when he grabbed my arms I just stepped back and kinda of snatched loose from him, without snatching very hard, and he fell on the road and then the two McCree Negroes and two others they came running up there and grabbed him and told him to the effect that I had done everything I could and the best thing for him to do was get in the car like I told him to. I told them you put him in the car, so they put him in my car. I shut the car door, put Lee McCree in the car with me up in the front seat with me and told another man in the group, who had a driver's license, to follow me to jail with the Oldsmobile. All the way to the jail James Fortson was talking, some kind of trashy stuff that I don't remember particular too much of what he was saying, he was doing a lot of cussing, a lot of threatening etc. I pulled up in front of the jail and he wanted to know if I was going to lock him up I told him yes I had no choice but to lock him up. He said all right I'll tell you what you lock me up but I'm goddamn shore going to get your tin badge. After this he walked on into the jail and I did not have to put my hands on him after we got in the jail. He did a lot of cussing and carrying on but he didn't resist or anything of that nature. After we got in the jail I sat down and wrote a card which we keep on all prisoners there, searched him, and told the jailer, J. C. Enfinger to carry him on upstairs and lock him up. Mr. Enfinger told him to come on and go upstairs with him he was going to put him in his cell. As they started upstairs he looked back at Mr. Enfinger and said "You're not anything but an old grey headed son-of-a-bitch". That was the last I heard James Fortson say that night. Mr. Enfinger went on upstairs with him and later came back down. I informed Mr. Enfinger of the charges against him.

The first time I saw James Fortson that night was when my headlights hit him as he was standing on the edge of the pavement of U. S. Highway 27. He started walking towards me because I was easing along on the shoulder of the road with my lights on. I noticed him staggering, in fact he was staggering pretty badly, the Negro that was with him was not staggering. The shoulder of the road at that point was not so rough, uneven or washed out as to cause a person to stagger or give the indication of staggering as he walked along it. When I started talking to him I noticed that his speech was kind of blurred and slurred and I had talked with him enough prior to that time that I knew how he talked when he was sober. I could smell intoxicating alcoholic liquors on his breath real strong at the time I was talking to him. He did not deny that he had been drinking but said in effect he didn't think he had had too much to drink. At the time I actually arrested him in my opinion he was still drunk. He staggered some when he got out of the car and walked around behind the car and came over beside me on the driver's side where I was standing. When he got up close to me I could still smell the odor of intoxicating alcoholic liquors on his breath. I could also tell by his speech that he was drunk. When I told him he was under arrest and he caught me by the arms I didn't hit him or shove him I just snatched my arms loose but he was drunk enough so he couldn't stand and his feet fell out from under him and he fell on the highway. I applied no pressure on him but he fell on his hands and knees. There was no doubt in my mind that he was drunk at that time also. Later on in the morning part of that day I made an affidavit before the Justice of the Peace as a basis for issuing a warrant charging him with violation of Section 860.01 of the Florida Statutes.

Sworn to and subscribed before
me this 31st day of May
A. D. 1966.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JAN. 20, 1969

MAY 2 1966

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICTS OF
FLORIDA-TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. HATHCOCK, et al.,

Defendants.

NOTICE OF TAKING DEPOSITION OF
WITNESSES ON ORAL EXAMINATION

TO: John D. Due, Jr., 540 1/2 West Brevard Street,
Tallahassee, Florida

You are hereby notified that on the 11th day of May, 1966 at 2:30 o'clock P. M. in the court room of the Gadsden County Court House in Quincy, Florida before Miss Frances Thigpen, a Notary Public, or some other duly qualified officer, who is not a relative, employee, attorney or counsel of any of the parties and who is not a relative or employee of any such attorney or counsel and is not interested financially in the action, the Defendants will take the deposition of Arthur Lee McCree General Delivery, Havana, Florida (but presently in Gadsden County Jail), Lee McCree Jr. General Delivery, Havana, Florida, and Horace Webster, Rt. 2 Quincy, Florida, Mr. Frank Smith.
by oral examination for the purpose of discovery or use as evidence in this action, or both, under the rules of civil procedure for the United States District Courts. The oral examination will continue from day to day until completed.

Allen M. [illegible]
ALLEN M. [illegible]
Attorney-at-Law
Box 361
Quincy, Florida
Attorney for Defendants

I DO CERTIFY, that copy hereof has been furnished to JOHN D. DUE, JR. 540 1/2 West Brevard Street, Tallahassee, Florida, by mail this 30 day of April, A. D. 1966.

Allen M. [illegible]
ATTORNEY

MAY 13 1966

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
FLORIDA-TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

vs.

ROBERT W. HATHCOCK, et al.,

Defendants.

INTERROGATORIES TO PLAINTIFF

Comes now the Defendants, Robert W. Hathcock, W. H. Summerford and Otho Edwards, by their undersigned attorney and under the provisions of the Federal Rules of Civil Procedure propound the following interrogatories to the Plaintiff, James Fortson, to be answered under oath as required by, and within the time prescribed in, said rules.

1. Where were you between 2:30 o'clock P. M. and 4:35 o'clock P. N. on May 11th, 1966?

2. Why did you not appear at the Gadsden County Court House in Quincy, Florida between 2:30 o'clock P. M. and 4:35 o'clock P. M. on May 11th, 1966 so that your deposition could be taken by the attorney for the above named defendants?

3. Why did neither you nor your attorney notify the defendants, or either of them, or their attorney, prior to 2:30 o'clock P. M., May 11, 1966 that neither you nor your attorney would be at the Gadsden County Court House at Quincy, Florida between 2:30 o'clock P. M. and 4:30 o'clock P. M. on May 11, 1966?

Alton H. Towles

ALTON H. TOWLES
Attorney-at-Law
Box 367
Quincy, Florida
Attorney for Defendants

I DO CERTIFY, That copy hereof has been furnished to JOHN D. DUE, JR. 340 1/2 West Brevard Street, Tallahassee, Florida, by mail this 12 day of May, A. D. 1966.

Alton H. Towles

ATTORNEY

MAY 13 1966

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
FLORIDA-TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. HATHCOCK, et al.,

Defendants.

ANSWER OF DEFENDANTS, ROBERT W.
HATHCOCK, W. H. SUMMERFORD AND
OTHO EDWARDS

Comes now the Defendants, Robert W. Hathcock, W. H. Summerford and Otho Edwards, jointly and severally, and for Answer to the Complaint as required by Order of this Court dated April 26, 1966 (the Complaint having been dismissed as to the other Defendants, and as a Class Action, and insofar as it sought to enjoin the enforcement of Section 856.01 F.S. and Sections 950.05 through 950.08 F.S., and with respect to Section 847.04 F. S.) say:

-1-

The pertinent allegations of paragraph number 1 of the Complaint are admitted with the exception of subparagraph (b) thereof as these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of said subparagraph (b).

-2-

The allegations of paragraph 3 of the Complaint are admitted as being true, as of the date the Complaint was filed, with the exception of the words "illegally imprisoned and illegally" and with the further exception that it is denied that Exhibits "A", "B" and "C" respectively were attached to Complaint. It is affirmatively alleged that at the present time the Plaintiff is not restrained by the Defendant, Summerford.

-3-

The pertinent allegations of paragraphs 4, 5, 6 and 7 of the Complaint are admitted.

-4-

The Defendants are without knowledge or information sufficient to form a belief as to the truth of all of the pertinent allegations of subparagraph (a) of paragraph 9 with the exception of the first sentence thereof and the words "the case was null prossed on November 18, 1966" which are admitted.

-5-

These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of subparagraph (b) of paragraph 9 of the Complaint.

-6-

The following allegations of subparagraph (c) of paragraph 9 of the Complaint are admitted, to-wit: "On November 19, James Fortson was out with his friends,"..."He was a guest of an automobile owned by another, when said automobile ran out of gas. While standing on the side of the road waiting for the automobile to be started,"..."acting under color of law"..."Robert W. Hathcock drove up in his automobile, stopped,"..."Subsequently, the automobile was started and the party with whom he was with drove to Havana in order to purchase more gasoline for their automobile. They then left Havana and were driving towards Tallahassee from Havana."..."Robert Hathcock stopped the automobile,"..."without warrant arrested James Fortson, who was only a guest, who was not driving, arrested James Fortson for being drunk,". The remaining allegations of said subparagraph (c) are denied either because they are untrue or because these Defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

-7-

The following allegations of subparagraph (d) of paragraph 9 of the Complaint are admitted; "James Fortson was then taken to Gadsden County Jail"..."James Fortson was then charged with "Open profanity".". The remaining allegations thereof are denied either because they are untrue or because these Defendants are without knowledge or information sufficient to form a belief as to the truth thereof. It is admitted and affirmatively alleged that while at the jail the Plaintiff called either the Defendant, Mathcock or the jailer, J. C. Enfinger, a "son-of-a-bitch" but it is not known to which of said persons the remark was addressed as both were present at the time but it is believed that the remark was addressed to J. C. Enfinger.

-8-

The following allegations of subparagraph (e) of paragraph 9 of the Complaint are admitted; "The jailer of the County Jail, then placed James Fortson in a cell in the Gadsden County Jail, the said jail segregated according to race, in that white male prisoners are housed separately from Negro male prisoners." the remaining allegations thereof are denied.

-9-

The allegations of subparagraph (f) of paragraph 9 of the Complaint are denied.

-10-

The following allegations of paragraph 10 of the Complaint are admitted; "On November 20, 1965 James Fortson was brought before A. D. Blackburn who read the affidavits," ... "to James Fortson and proceeded to try him for the offenses alleged therein."..."under color of law". All of the other allegations thereof are denied.

-11-

The following allegations of paragraph 11 of the Complaint are admitted; "Acting under color of law"..."A. B. Blackburn sentenced James Fortson to be committed to the Gadsden County Jail for sixty (60) days, for open profanity and for being drunk". All of the other allegations thereof are denied.

-12-

The following allegations of paragraph 12 of the Complaint are admitted; "James Fortson was taken by Robert Mathcock to the County Jail and then acting again under color of law"..."Brought James Fortson to W. K. Summerford, Superintendent of the Gadsden County Prison Stockade, who took James Fortson into said institution, said institution established for the punishment of prisoners at hard labor,"...'being under color of law".. "James Fortson was then placed in that portion of the Gadsden County Prison Stockade, said portion of said stockade, being segregated according to race in that white male prisoners are housed separately from Negro male prisoners,". It is admitted that James Fortson, during a portion of the time he was in the stockade, along with other prisoners of the Negro race, was treated differently from prisoners of the white race in that Negro prisoners were worked at hard labor on the County roads, under a gun, whereas white prisoners were given jobs in the confines of the stockade. It is denied that this is a policy designed to affect the Negro prisoners more than the white prisoners and it is affirmatively alleged that this practice is because Negroes are worked separately from white prisoners and it has been some years since there were enough white prisoners in the stockade at any one time to make up a normal work crew for work on the County roads; that when, as and if, there are sufficient white prisoners, otherwise physically able, to make up a normal crew for work on the County road that they would be so worked. It is admitted that James Fortson, along with other members of the Negro race, at the time he was in the Gadsden County Prison Stockade, was treated differently from prisoners of the white race in that Negro prisoners and white prisoners were housed, fed and worked separately; this was done in compliance with the then existing administrative rules and regulations of the Florida Division of Corrections, which had not been changed since the repeal of 950.05-950.06 F.S. and the enactment of 950.051 and 950.061 by the 1963 Florida Legislature, to which rules and regulations the defendant, Summerford, not knowing of said repeal and enactment, believed in good faith he was subject, and especially that rule number 190A-3.041 (8) which provided as follows, to-wit:

> "(8) White and colored prisoners shall be housed, fed and worked separately, except in such instances where their working together is necessary or where their working separately is impracticable."

That for a long time prior to the Plaintiff Fortson's said confinement, during the term thereof and since that time, there has not been sufficient white prisoners in the stockade to make up a normal work crew of white persons for work on the road; That Defendant, Summerford, was officially advised by the Director of the Florida Division of Corrections, for the first time (by a letter to this Defendant's attorney dated May 6, 1966) that such regulations are obsolete, the pertinent part of such letter being as follows:

> "Florida Statutes Chapter 950.06, 1963, stated it was unlawful for white and colored prisoners, male and female prisoners, to be confined together. Regulations pertaining to county confinement facilities were issued at that time which included this statute. However, this statute did not occur in the 1965 Florida Statutes; consequently, Chapter 950.06 of 1963 is no longer effective and the previously issued regulations are obsolete. All of these regulations should be removed from county confinement facilities.
>
> As yet, new rules and regulations pertaining to county confinement facilities have not been issued but we anticipate having them completed within approximately 120 days."

That the Defendant, Summerford, unless otherwise directed by this court, plans to continue, as a practice which in his judgment is desirable, the segregation of the prisoners assigned to him the same as if such rule, but only to that extent, was still in full force and effect, and would in effect adopt such rule as his own for purposes of the administration of the stockade, until he receives other rules and regulations of the Florida Division of Corrections differing therefrom; that his reasons for adopting and enforcing such rule are as follows:

(A) That this practice of segregation is one of long standing and prisoners and stockade personnel are habituated to it,

(B) This Defendant does not see, in his best judgment, how any harm can be done to anyone by such continued segregation, only however, to the extent, as provided in said rule,

(C) That normally there are only two to five white prisoners in the stockade at any one time but there are eighteen to twenty-five Negro prisoners therein; that in the judgment of the Defendant, Summerford, the prisoners would be more contented and would get along better together and their conduct in the stockade would be more harmonious if they continued to be so segregated.

(D) That to do otherwise would, in the judgment of the Defendant, Summerford, because of the difference in race, invite and cause more discord, squabbling, fisticuffs, fights, unnecessary shoving and pushing which would inflame tempers and even cause possible bloodshed.

(E) That to do otherwise would, in the opinion of the Defendant, Summerford, because of the difference in the number of each race, cause friction, bullying, undercover oppression, discord and fights because of the preponderance of one race over the other.

(F) That while sufficient control might be exercised over the groups when working together under a guard (although the guard's job of enforcing discipline during working hours would be immeasurably increased and made unnecessarily difficult and demanding) yet it would be almost impossible to normally guard against those happenings, or some of them, when the prisoners were housed together and eating together during non-working hours.

That the housing, bedding, food, working conditions, and other facilities are, and have been, equal for both races except as herein set forth; each prisoner is, and has been, fed the same food, the same amount of food, from the same menu, cooked by the same persons, in the same vessels and utensils and each now uses, and has used for sometime, the same kind of plates, a metal type plate, with no distinction being made between the races in this respect; that during the time Plaintiff was in the custody of Defendant, Summerford, Plaintiff was issued the same kind and type of bed clothes and blankets from the same stock pile, equal in cleanliness when issued as were all other prisoners, white or Negro, with no distinction being made in that respect; this is now, and has been, the practice in the stockade for many years. It is admitted that while the Plaintiff was in such stockade Negro prisoners used metal plates and white prisoners used China ware and that there were certain tasks around the prison camp for which prison labor was used; that the work of these tasks ordinarily did not require a prisoner to work as hard as one working on the County roads; that white prisoners, to the extent they were available, were ordinarily used on and for these tasks while Plaintiff was a prisoner but it is affirmatively alleged that any prisoner too old or crippled or otherwise incapacitated for road work is also used for these tasks; it is affirmatively alleged that Plaintiff served most of his sentence in the prison camp as a member of this group doing tasks around the prison camp and *not* as a member of the group working on the road; it is denied that *all* Negro prisoners were or are worked on the roads; all other allegations thereof are denied. It is affirmatively alleged that the reason white prisoners were normally used for the work around the camp, to the extent they were available, was because there were insufficient white men, physically able to work on the road, available at any time to make up a separate full road work crew; to employ a guard for less than a normal sized work crew was not considered financially desirable when these men were needed for the required work around the camp; it is the considered judgment of the Defendant, Summerford, based on more than 15 years experience as either assistant Superintendent or Superintendent of the Gadsden County Prison Stockade (sometimes herein referred to as Camp) that prison discipline has been, is and would be easier and better maintained, with less likelihood of fighting, oppression or discord among the inmates if the practice was continued.

-13-

The allegations of paragraph 13 of the Complaint are denied.

-14-

It is admitted that during the time Plaintiff was in the prison stockade the white and Negro prisoners were segregated under the provisions of rule number 190A-3.041(8) hereinabove referred to; all of the other allegations of paragraph 15 of the Complaint are denied.

-15-

It is admitted that Gadsden County is a county in North Florida; all of the other allegations of paragraph 16 of the Complaint are denied.

-16-

Subject to any admissions heretofore made in this answer, the allegations of paragraph 17 of the Complaint are denied.

-17-

The allegations of paragraphs 19 and 20 of the Complaint are denied.

-18-

These defendants are without knowledge or information sufficient to perform a belief as to the truth of the allegations of paragraph 21 of the Complaint.

Alton

ALTON N. FOWLER
Box 367
Quincy, Florida
Attorney for Defendants

I DO CERTIFY, That copy hereof has been furnished to JOHN D. DUS, JR., 340 1/2 West Brevard Street, Tallahassee, Florida, by mail this 11 day of May, A. D, 1965.

ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. HATHCOCK, et al.,

Defendants.

AFFIDAVIT OF J. C. ENFINGER

J. C. ENFINGER being by me first duly sworn, deposes and says:

That I am now, and have been continuously, for more than two years immediately prior to the date of this affidavit, a duly appointed, qualified and acting Jailer of the Gadsden County, Florida Jail; that I have personal knowledge of the facts, matters and things set forth in this affidavit.

That this affidavit is submitted in support of the MOTION OF DEFENDANTS, ROBERT W. HATHCOCK AND OTHO EDWARDS, JOINTLY AND SEVERALLY FOR FINAL SUMMARY JUDGMENT in their favor jointly and in favor of each of them severally in this cause for the purpose of showing that there is no genuine issue as to any material fact and that the moving parties are, and each of them is, entitled to such judgment as a matter of law.

On the night of November 19th-20th, 1965, I was engaged in my official duties as Jailer aforesaid and was located at the Gadsden County, Florida Jail at Quincy, Florida; that at approximately 2:20 o'clock A. M. on the 20th day of November, 1965 Robert W. Hathcock brought James Fortson as a prisoner to the Gadsden County, Florida Jail; there are records at the jail on which a record is kept as to the name of the prisoner delivered to me as Jailer and the date the prisoner is delivered to me; when James Fortson was brought in I started writing him up and Mr. Hathcock told me he was through with him and to take him on up and lock him up; as James Fortson walked to the stairway leading to the second story of the Jail and as he went up the stairway and walked down the corridor to the cell he was placed in he kind of weaved as he walked and in my opinion he was drunk from the use of intoxicating liquors; James Fortson had been in Jail prior to this time while I was Jailer and I had seen him several times when he was sober. He acted differently on this night from the times he was sober; he was more tongue tied that night when he talked while when he is sober he is not tongue tied; he weaved in his walk that night but when he is not drunk he does not weave in his walk; I smelled some kind of intoxicating liquor on his breath; it was very noticeable; I have been around numbers of people at different times when they were sober and around the same people later on when they were drunk; it is my opinion that I can tell the difference between a man when he is drunk and when he is sober; the usual records of admittance to Jail and release from Jail were kept in connection with James Fortson.

Sworn to and subscribed
before me this 21st day
of May A. D. 1966.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JAN. [illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. HATHCOCK, et al.,

Defendants.

AFFIDAVIT OF OTHO EDWARDS

OTHO EDWARDS, being first duly sworn, deposes and says:

That I am now, and have been, continuously, for more than the 20 years immediately prior to the date of this affidavit, the duly appointed, qualified and acting sheriff of Gadsden County, Florida; that I have personal knowledge of the facts, matters and things set forth in this affidavit.

That this affidavit is submitted in support of the MOTION OF DEFENDANTS, ROBERT W. HATHCOCK AND OTHO EDWARDS, JOINTLY AND SEVERALLY FOR FINAL SUMMARY JUDGMENT in their favor jointly and in favor of each of them severally in this cause for the purpose of showing that there is no genuine issue as to any material fact and that the moving parties are, and each of them is, entitled to such judgment as a matter of law.

That a daily record is kept under my direction, supervision and control by my deputies or subordinates of all persons placed in, or released from, the Gadsden County, Florida Jail; that such a record has been kept, and was being kept, on, prior and subsequent to, November 19, 1965; that on, prior and subsequent to, November 19, 1965 such daily record for each 24 hour period began at approximately 5:00 o'clock A. M. on the date such record is and was dated and ended 24 hours thereafter (or approximately 5:00 o'clock A. M. on the calendar day following that on which the record is dated); that any person placed in said jail or released therefrom after midnight on the day such daily record is dated is, and would be, listed on such record as having been placed in, or released from, said Jail on the calendar date of such daily record even though as a matter of actual fact it might have occurred between the hours of 12:00 o'clock midnight and 5:00 o'clock A. M. of the following calendar date; that there is attached hereto as Exhibit "A" a true and correct photographic copy of such daily record for November 19, 1965; that there is attached hereto as Exhibit "B" a true and correct photographic copy of such daily record for November 20, 1965;

Sworn to and subscribed before
me this 21st day of May,
A. D. 1966.

Laura Belle Edwards

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JAN. 20, 1969

JUN 2 1966

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF FLORIDA TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1136

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. [illegible], et al.,

Defendants.

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF GADSDEN

ALTON M. TOWLES being by me first duly sworn deposes and says that he is the attorney for the Defendants in the above entitled cause; that on the 12th day of May, 1966 he did mail to John D. Due, Jr., 140 1/2 West Brevard Street, Tallahassee, Florida, the attorney for the Plaintiff in the above entitled cause, a true and complete copy of INTERROGATORIES TO PLAINTIFF (the original of which has been filed with the Clerk of the above named Court) enclosed and securely sealed in an envelope bearing the requisite amount of uncancelled United States postage stamps to insure its delivery to addressee, which envelope was addressed as follows:

John D. Due, Jr.
140 1/2 West Brevard Street
Tallahassee, Florida

by depositing said envelope, properly sealed, stamped and addressed as aforesaid, in the United States post office in the City of Quincy, Florida.

That as of 11:30 o'clock A. M. Eastern Standard time of the date of this affidavit no Answers nor a copy of the Answers to said INTERROGATORIES TO PLAINTIFF have been served upon the parties submitting the interrogatories, nor has the Court enlarged the time for such service.

Alton M. Towles
ALTON M. TOWLES

Sworn to and subscribed before me this 1st day of June,
A. D. 1966.

Jackson G. Beatty

Notary Public, State of Florida at Large
My Commission Expires Sept. 22, 1968
Bonded by American Fire & Casualty Co.

I DO CERTIFY, That copy hereof has been furnished to JOHN D. DUE, JR., 540 1/2 West Brevard Street, Tallahassee, Florida, by mail this 1st day of June, A. D. 1966.

ATTORNEY

JUN 2 1966

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES [illegible],

Plaintiff,

vs.

[illegible] W. [illegible], et al.,

Defendants.

MOTION OF DEFENDANTS, ROBERT E. [illegible], [illegible] EDWARDS AND W. H. [illegible], JOINTLY AND SEVERALLY, TO DISMISS [illegible] WITH PREJUDICE

The Defendants, Robert E. [illegible], [illegible] Edwards and W. H. [illegible], jointly and severally move the Court to dismiss the Complaint in this cause with prejudice as to these Defendants, jointly and severally, on the following grounds, to-wit:

1. That the Plaintiff, James [illegible], after being served with proper notice wilfully failed to appear before the officer who was to take his deposition.

2. That the Plaintiff, James Fortune, failed to serve answers to interrogatories submitted under Rule 33 of Rules of Civil Procedure for the United States District Courts after proper service of said interrogatories.

3. That the Plaintiff, James [illegible], failed to comply with the Rules of Civil Procedure for the United States District Courts, especially Rule 33 thereof requiring the party upon whom interrogatories have been served to serve a copy of the answers on the party submitting the interrogatories within the time provided by said Rule and with the implied requirements of said Rules that the Plaintiff, after being served with a proper notice, shall appear before the officer who is to take his deposition at the time and place set forth in said notice.

[illegible] N. [illegible]
Box 367
Quincy, Florida
Attorney For Plaintiff

I DO CERTIFY, That copy hereof has been furnished to JOHN D. DUE, JR., 540 1/2 West Brevard Street, Tallahassee, Florida, by mail this 1st day of June, A. D. 1966.

ATTORNEY

JUN 3 1965

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. [illegible]

JAMES FORTSON,

Plaintiff,

VS.

ROBERT W. HATHCOCK, et al.,

Defendants.

MOTION OF THE DEFENDANTS, ROBERT W. HATH-
COCK AND OTTO EDWARDS, JOINTLY AND SEVERALLY FOR FINAL SUMMARY JUDGMENT

Comes now the Defendants, Robert W. Hathcock and Otto Edwards, jointly and severally, and move the Court for Summary Final Judgment in their favor jointly, and in favor of each of them severally, in this cause on the ground that the pleadings, depositions and affidavits on file in this cause and the affidavits hereto attached show that there is no genuine issue as to any material fact and that said Defendants are, and each of them is, entitled to such Summary Final Judgment as a matter of law.

[illegible] W. TOWLES
Box 367
Quincy, Florida
Attorney for Defendants

I DO CERTIFY, That copy hereof has been furnished to JOHN D. DUE, JR., 540 1/2 West Brevard Street, Tallahassee, Florida, by mail this 2nd day of June, A. D. 1965.

ATTORNEY

JUN 10 1966

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF FLORIDA TALLAHASSEE DIVISION

CIVIL ACTION FILE NO. 1130

JAMES FORTSON,

Plaintiff,

vs.

ROBERT W. HATHCOCK, et al.,

Defendants.

NOTICE OF HEARING ON MOTIONS

TO: John D. Due, Jr.
Attorney for Plaintiff

You are hereby notified that I will call up for hearing before the judge of the above named Court, in chambers, at his office in the post office building Tallahassee, Florida, at 10:00 o'clock A. M., Eastern Standard Time, Wednesday, June 22, 1966 the following pending motions, to-wit:

MOTION OF DEFENDANTS, ROBERT W. HATHCOCK, OTHO EDWARDS AND W. H. SUMMERFORD, JOINTLY AND SEVERALLY, TO DISMISS COMPLAINT WITH PREJUDICE.

MOTION OF THE DEFENDANTS, ROBERT W. HATHCOCK AND OTHO EDWARDS, JOINTLY AND SEVERALLY, FOR FINAL SUMMARY JUDGMENT.

Alton B. Fowler
ALTON B. FOWLER
Box 367
Quincy, Florida
Attorney for Defendants

I DO CERTIFY, That copy hereof has been furnished to JOHN D. DUE, JR., 540 1/2 West Brevard Street, Tallahassee, Florida, by mail this 8th day of June, A. D. 1966.

Alton B. Fowler
ATTORNEY

IN THE CIRCUIT COURT OF FLORIDA,
EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY.
IN CHANCERY.
No. C-298-66

SAVANAH P. WILLIAMS,
Plaintiff

vs.

G. M. DAVIS, CHAIRMAN OF THE BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY; JOHN L. CONNELL, COUNTY JUDGE IN AND FOR ALACHUA COUNTY, FLORIDA; AND ALMA K. BETHEA, SUPERVISOR OF ELECTIONS IN AND FOR ALACHUA COUNTY, FLORIDA; AS AND CONSTITUTING THE BOARD OF CANVASSERS IN AND FOR ALACHUA COUNTY;

AND

LAURA T. CARMICHAEL, HELEN CUBBERLY ELLERBE, CAROL W. THOMAS,
Defendants

COMPLAINT

1.

The plaintiff, Savanah P. Williams, a citizen and resident of the County of Alachua, Florida, sues the defendants, G. M. Davis, Chairman of the Board of County Commissioners of Alachua County, Florida; John L. Connell, County Judge in and for Alachua County, Florida; and Alma K. Bethea, Supervisor of Elections in and for Alachua County, Florida, as constituting the Board of Canvassers in and for Alachua County; and Laura T. Carmichael, Helen Cubberly Ellerbe, Carol W. Thomas, each of whom is a citizen and resident of Florida, and alleges;

2.

That the three members of the above-mentioned Canvassing Board of the County of Alachua completed the canvass of the election returns in the May 24 election 1966 on Wednesday, May 25, 1966;

3.

That the election returns so canvassed declared that for Precinct 25 in Alachua County, Laura T. Carmichael and Carol W. Thomas were declared elected as Democratic Committeewomen for the two vacancies in Precinct 25;

4.

That the plaintiff, Savanah P. Williams, timely filed with the Clerk of the Circuit Court County of Alachua as a candidate for the Democratic Committeewoman Group 2 seat in Precinct 25 in accordance with the requirement for grouping of names of candidates upon the official voting machine ballot (Florida Statutes 100.071);

5.

That the defendant, Laura T. Carmichael, filed with the Clerk of the Circuit Court County of Alachua as a candidate for the Democratic Committeewoman Group 2 seat in Precinct 25 in accordance with the requirement for grouping of names of candidates upon the official voting machine ballot (Florida Statutes 100.071);

6.

That the defendants, Helen Cubberly Ellerbe and Carol W. Thomas, filed with the Clerk of the Circuit Court County of Alachua as candidates for the Democratic Committeewoman Group 1 seat in Precinct 25 in accordance with the requirement for grouping of names of candidates upon the official voting machine ballot (Florida Statutes 100.071);

7.

That the official ballot included for the Precinct 25 election for Democratic Committeewoman the names of the plaintiff, Savanah P. Williams, and the defendant, Laura T. Carmichael, and also the names of defendants, Helen Cubberly Ellerbe and Carol W. Thomas, showing all the above-mentioned four names in one group with the caption "vote for two" as indicated on the sample ballot attached;

8.

Wherefore, the above facts constituting a cause of action, the plaintiff, Savanah P. Williams, petitions that the May 24 Precinct 25 election for Democratic Committeewoman be declared null and void, or such other appropriate relief.

Dated at Gainesville this 4th day of June, 1966.

Savanah P. Williams
Savanah P. Williams
Plaintiff

STATE OF FLORIDA

COUNTY OF ALACHUA

Savanah P. Williams, being first duly sworn on oath, deposes and says that she has read the above and foregoing and that the statements contained therein are true.

Savanah P. Williams
Savanah P. Williams

Sworn to and subscribed before me this 4th day of June, A. D. 1966.

W. L. Sander
Notary Public

NOTARY PUBLIC STATE of FLORIDA at LARGE
MY COMMISSION EXPIRES SEPT. 7, 1968
BONDED THROUGH FRED W. DIESTELHORST

5.

That the defendant, Albert L. Daniels, filed with the Clerk of the Circuit Court County of Alachua as a candidate for the Democratic Committeeman Group 1 seat in Precinct 7 in accordance with the requirement for grouping of names of candidates upon the official voting machine ballot (Florida Statutes 100.071);

6.

That the defendants, Allison E. Folds, Jr. and Jack Zimmerman, each improperly filed for Precinct 7 vacancies for Democratic Committeeman, insomuch as each failed to select and specify either Group 1 or Group 2 seat in his qualifying statement, as required by Florida Statute 100.071;

7.

That the official ballot for the Precinct 7 election for Democratic Committeeman included the names of the plaintiff, Oran "King" Roberts, and the defendant, Albert L. Daniels, and also the names of defendants Allison E. Folds, Jr. and Jack Zimmerman, showing all the above-mentioned four names in one group with the caption "vote for two" (as indicated on the sample ballot attached);

8.

Wherefore, the above facts constituting a cause of action, the plaintiff, Oran "King" Roberts, petitions, asks, and demands that he, Oran "King" Roberts, be declared elected to the Group 2 seat for Democratic Committeeman in Precinct 7 of Alachua County in the May 24 election, or in the alternative, that the Precinct 7 election for Democratic Committeeman be declared null and void, or such other appropriate relief.

Dated at Gainesville this 4th day of June, 1966.

Oran "King" Roberts
Oran "King" Roberts
Plaintiff

STATE OF FLORIDA
COUNTY OF ALACHUA

Oran "King" Roberts, being first duly sworn on oath, deposes and says that he has read the above and foregoing and that the statements contained therein are true.

Subscribed to and sworn
before me this June 4, 1966
W. L. Sander, Notary Public

Oran "King" Roberts
Oran "King" Roberts

NOTARY PUBLIC STATE of FLORIDA at LARGE
MY COMMISSION EXPIRES SEPT. 7, 1968
BONDED THROUGH FRED W. DIESTELHORST

Precinct 16--Girl Scout Hut, northwest Gainesville; two seats 36.05%
Robert F. Hyatt 1015 N.W. 14 Ave., Gainesville 372-4658

Winifred L. Dusenbury 1017 N.W. 14 Ave., Gainesville 376-3048
Negro Rosa B. Williams 1202 N.W. 5 Ave., Gainesville 372-6573

Precinct 17--Gainesville High School, northwest Gainesville; one seat 0%
Denny L. Walker 1825 N.W. 22 Terr., Gainesville 376-5488
Audrey G. Herbert 2350 N.W. 16 Ave., Gainesville

Precinct 18--Arredondo; one seat 26.2% Negro

Precinct 19--Orange Heights; one seat 11.2%
Floyd E. Tillman Rt. 2 Box 268, Hawthorne
Mrs. Floyd E. Tillman Rt. 2 Box 268, Hawthorne

Precinct 20--High Springs (north of highway); one seat 22.37% Negro
Negro Taylor Simmons Rt. 1 Box 37, High Springs

Precinct 21--High Springs (south of highway); one seat 29.05% Negro
Howard W. O'Steen Rt. 2 Box 179, High Springs

Precinct 22--Campville; one seat 25% Negro
Leslie Ralph Snowden Rt. 2 Box 167, Hawthorne
Dot B. Snowden Rt. 2 Box 167, Hawthorne

Precinct 23--P. K. Yonge school, southwest Gainesville; two seats 3.5%
Howard Adams 3915 S.W. 18 St., Gainesville 372-9647
Albert H. Miller Rt. 4 Box 143, Gainesville 376-7924
Faye T. Barton 1133 S.W. 25 Pl., Gainesville 376-7296
Rosalie Hawthorne Miller Rt. 4 Box 143, Gainesville 376-7924

Precinct 24--Westwood Jr. High, northwest Gainesville; two seats 0%
Charles W. Ansell 123 N.W. 26 St., Gainesville 372-4793
F. Blair Reeves 312 N.W. 32 St., Gainesville 376-7303
Ethel F. Adkins 2829 N.W. 4 Lane, Gainesville 372-4989
Judith K. Goffman 1424 N.W. 31 St., Gainesville 372-5206

Precinct 25--Buchholz Jr. High, southwest Gainesville; two seats 32.3% Negro
Hal G. Lewis 1230 S.W. 9 Road, Gainesville
William G. Woodbury 1114 S.W. 6 Ave., Gainesville
Laura T. Carmichael 609 S.W. 9 St., Gainesville
Carol W. Thomas 423 S.W. 10 St., Gainesville 372-8396

Precinct 26--Littlewood school, northwest & southwest Gville; two seats 2.06%
R. A. Green, Jr. 10 S.W. 23 Drive, Gainesville
Carl B. Opp 613 S.W. 28 St., Gainesville
Saundra J. Green 10 S.W. 23 Drive, "
Jacquelyn B. Opp 613 S.W. 28 St., "

Precinct 28--Voting Machine Warehouse, southeast Gainesville; two seats 53.16% Negro
Negro W. L. Johnson 913 S.E. 9 Pl., Gainesville
Negro Eugene R. Wheaton 1239 S.E. 11 Ave., Gainesville
Negro Barbara H. Bryant P.O. Box 301, Gainesville 372-1598
Eleanor Cunningham 231 S.E. 2 St., Gainesville

Precinct 27--Gainesville Recreation Center, northeast Gainesville, one seat 9.68% Negro
J. Pope Chaney 1227 N.E. 4 St., Gainesville
Ann J. Chaney 1227 N.E. 4 St., Gainesville

Precinct 29--Howard Bishop Jr. High, northeast Gainesville; two seats 0%
Charles Farris 714 N.E. 12 Ave., Gainesville

Patricia Farris 714 N.E. 12 Ave., Gainesville
Dorothy A. Matske 1416 N.E. 7 St., Gainesville

Alachua County Democratic Committee--1968-72

Precinct 1--Waldo; one seat 15.8% Negro
General Lee Foster, Jr. Box 62, Waldo 468-1537?
Colleen D. Gilland Star Route, Waldo

Precinct 2--La Crosse; one seat 43.28% Negro

Precinct 3--Alachua; two seats 34.02%

Precinct 4--Kirby-Smith school, northeast Gainesville; one seat 2.7%
Leo E. Ward 1103 N.E. 5th Ave., Gville 376-7469

Precinct 5--J. J. Finley school, northwest Gainesville, two seats 5%
Sidney Knight 23 N.E. 20 Drive, Apt. 4, Gville 372-6518
Ledgar K. Walker 1516 N.W. 17 Terr, Gainesville 372-7501
Shirley A. Conroy 1861 N.W. 11 Road, Gainesville 376-4575
Elna C. Henderson 1524 N.W. 12 Road, Gainesville 372-4967

Precinct 6--Newberry; one seat 26.69% N.
Henry W. Bethea Rt. 1, Box 10 Newberry, Fla. 472-2426
Maggie E. Hathcox P.O. Box 474, Newberry 472-2558

Precinct ~~6x~~ 7--Sidney Lanier school, northwest Gainesville; two seats 47.53%
Negro Albert L. Daniels 630 N.W. 6 Ave., Gainesville 376-6923 Negro
Allison E. Folds, Jr. 719 N.W. 19 Ave., Gainesville 372-7905
Negro Eddie Sanders 514 N.W. 2 St., Gainesville, 372-9310 or 6-6252

Precinct 8--Hawthorne; one seat 40.72% Negro
G. E. Gay Hawthorne 481-2241
Annie Mae Phillips Hawthorne

Precinct 9--Island Grove; one seat 1.59%
James C. Crosby Island Grove
Grace B. Williams Island Grove

Precinct 10--Micanopy; one seat 31.06%

Precinct 11--Archer; one seat 38.92%

Precinct 12--Stephen Foster school, northwest Gainesville; two seats 2.7%
Maurice F. Brunson 813 N.W. 30 Ave., Gainesville 372-4317
James R. Pierce 4216 N.W. 21 Terr. "

Precinct 13--School Administration bldg., east Gainesville; two seats
Negro H. L. Jackson 2007 N.E. 8 Pl., Gainesville 376-1792 72.9%
Negro Forman Wingate, Jr. 1534 S.E. 14 Ave. Gainesville 372-8969
Agnes S. Grady 1533 E. Univ. Ave., Gainesville Negro
Negro Ruth S. Lipsey 1605 S.E. 12 Ave 372-1025

Precinct 14--Melrose; one seat 3.4%

Precinct 15--Rochelle; one seat 38.46%

Precinct 30--Lake Forest school; east Gainesville; one seat [illegible] % Negro
W. T. Bryant 4719 E. Univ. Ave., Gainesville
Rozada Wells 4010 E. Univ., Ave., Gainesville

Precinct 31--Fla. Union Bldg., Univ. of Fla.; one seat
Herbert P. Sterling
Martha [illegible] Sterling

Precinct 32--Myra Terwilliger school, northwest Gainesville; one seat
James S. Quincey 4431 N.W. 16 Pl., Gainesville 12.5% Negro

Precinct 33--Metcalfe Elementary school, northeast Gainesville; two seats
Rt
L. J. "Lu" Hindery 1425 N.E. 13 St., Gainesville
Richard T. Jones 1611 N.E. 15 St., Gainesville
Dorothy S. Kirchoff 1322 N.E. 31 Ave., Gainesville
Doris [illegible]. Williams 1626 N.E. 15 Terr., Gainesville

Precinct 34--Fairbanks; one seat
Stephen C. Elwood Rt. 1 Box 3[illegible] 3/4, Gainesville
Ruby E. Badcock Rt. 1 Box 30A1, Gainesville 15% Negro

THE FOLLOWING PAGES ARE THE BEST AVAILABLE.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES FORTSON,

Plaintiff

-vs-

ROBERT W. HATHCOCK, individually
and as Deputy Sheriff of Gadsden County,
Quincy, Florida;
A.B. BLACKWELL, individually and as
Justice of the Peace of Gadsden County,
Quincy, Florida;
W.H. SUMMERFIELD, individually and
as Superintendent of the Gadsden County
Prisoners' Stockade;
OTHO EDWARDS, individually and as
Sheriff of Gadsden County, Quincy, Florida;
The BOARD OF COUNTY COMMISSIONERS,
Gadsden County, the State of Florida,
both Jointly and severally,

Defendants.

CIVIL ACTION

****

PETITION

That the Petitioner and Complainant, James Fortson, by and through his undersigned and authorized Counsel, for the cause of action herein, alleges [illegible]:

1. (a) Jurisdiction of this Court is based on the following, in that:

(i) During all times herein mentioned, the Plaintiff is a citizen and resident of Gadsden County, State of Florida, and is of full age; and the Defendants are citizens and residents of Gadsden County, State of Florida, and are of full age.

(ii) The amount in controversy exceeds the sum of $10,000.

(b) Jurisdiction of this Court is further founded under the 14th Amendment to the United States Constitution, Title 28, United States Code, Sections 1331, 1343, 1361, 2241 et seq. and 2283; and also Title 42, United States Code, Sections 1981, 1983, 1985, 1986 and 1988.

(c) Plaintiff seeks damages and an injunction and other equitable relief and also is seeking an order to show cause in the nature of a Writ of Habeas Corpus.

(d) Plaintiff also seeks to restrain enforcement [illegible] execution of F.S. 950.05 - 950.08 and F.S. [illegible] no basis for a 3-judge court because there is no substantial question of constitutionality of the aforesaid statutes.

2. The Plaintiff brings this action in his own behalf and on behalf of all other persons similarly situated and affected with reference to the matters herein [illegible] members of this class are too numerous to make it pr[illegible] questions of [illegible] action is brought as a class suit under [illegible] Federal [illegible] Procedure. The Plaintiff very adequately represents [illegible] class.

3. Plaintiff, James Fortson, is a member of the Negro Race and is presently illegally imprisoned and illegally restrained in the Gadsden Prison Stockade, located in Quincy, Florida. James Fortson is being restrained by W.H. Summerfield, in the latter's capacity as Superintendent of the Gadsden County Prison Stockade. The restraint of James Fortson is by virtue of sentence signed by A.B. Blackwell, in his capacity as justice of the Peace, Gadsden County, and by virtue of affidavits signed by Robert Hathcock, in his capacity as Deputy Sheriff of Gadsden County. The said sentence and affidavits are included and incorporated herein and are attached to this complaint as Exhibits "A", "B" and "C" respectfully.

4. During all times herein mentioned, the Defendant, Robert W. Hathcock, was duly appointed, qualified, and presently acting as Deputy Sheriff in Gadsden County, Quincy, Florida.

5. During all times mentioned herein, the Defendant, A.B. Blackwell, was duly appointed, qualified, and acting as Justice of the Peace in and for the First District, Gadsden County, State of Florida.

6. During all times herein and hereafter mentioned, the Defendant, W.H. Summerfield, was acting and duly appointed, qualified and acting as Superintendent of the Gadsden County Prison Stockade, and is charged with the obligation of caring for the prisoners in the County Stockade, Gadsden County.

7. During all times herein and hereinafter mentioned, the Defendant, Otha Edwards, is duly appointed, qualified, and acting as Sheriff of Gadsden County, and as Superintendent of the County Jail, Gadsden County, State of Florida, and is charged with the obligation of caring for the prisoners in the County Jail, Gadsden County.

8. During all times herein mentioned, the Defendant, the Board of County Commissioners of Gadsden County, is the legislative body of Gadsden County, Florida, and is charged with the obligations as are more clearly set forth in F.S. 950.05 - 950.08, herein alleged to be invalid and unconstitutional;

9. (a) On May 27, 1965, by information, James Fortson was charged with aggravated assault. Believing that the prosecution of his son was a

conspiracy by the State officials to deny James Fortson equal protection under the laws, Rev. W.H. Fortson, President of the Havana N.A.A.C.P., retained John Due, Attorney for CORE. Both groups are described as Civil Rights organizations. With testimony that the said offense was a result of a psychosis suffered by James Fortson, the case was nol prossed on November 18, 1965.

(b) James Fortson is still suffering a psychosis which at the present time is alleviated and controlled by tranquilizer drugs. James Fortson was advised by his doctors at the Florida State Hospital at Chattahoochee, for Mental Patients, never to partake of any alcoholic beverages, that they m were extremely dangerous to his mental and physical health. James Fortson (has not taken any alcoholic beverages since the time before he was taken to the Florida State Mental Hospital in Chatahoochee in May 1965.)

(c) On November 19, James Fortson was out with his friends, enjoying and exercising his freedom to associate and to travel, and was strictly adhering to the abovesaid advice not to take any alcoholic beverages and was not violating any laws of the State of Florida. He was a guest of an automobile owned by another, when the said automobile ran out of gas. While standing on the side of the road waiting for the automobile to be started, without probable cause, or reasonable suspicion and acting under color of law and in conspiracy with others, Robert Hathcock drove up in his automobile, stopped, and ordered James Fortson to get "out of here" and otherwise verbally abusing James Fortson. James Fortson explained his presence there, explained that he was not violating any law of the State of Florida. Subsequently, the automobile was started and the party with whom he was with drove to Havana in order to purchase more gasoline for their automobile. They then left Havana and were driving towards Tallahassee from Havana when they noticed that they were again being followed by Robert Hathcock. Robert Hathcock stopped the automobile, and again, (without reasonable suspicion, probable cause, and without a warrant,) arrested James Fortson, who was only a guest, who was not driving, arrested James Fortson for being drunk, although James Fortson told Robert Hathcock that he could not drink and although Robert Hathcock knew of the mental condition of James Fortson.

(d) James Fortson was then taken to Gadsden County Jail and was again verbally abused, by Robert Hathcock calling him "black son of a bitch", Robert Hathcock knowing James Fortson suffered from psychosis. Therefore Robert Hathcock caused James Fortson to reply in kind, such as "white son of a bitch", for which James Fortson was then charged with "open profanity".

(e) Robert Hathcock and the jailer of the County Jail, then placed James Fortson in a cell in the Gadsden County Jail, the said jail segregated according to race, in that white male prisoners are housed separately from Negro male prisoners, all in accordance with the provisions of Florida Statutes 950.05 - 950.08. The Defendants are actively engaged in the enforcement and execution of the said statutes.

(f) James Fortson, by Robert Hathcock and the County jailer, was denied the right to :

(i) make bond bail or post a bond because no bail bond had been set in his case.

(ii) was denied the right to contact his Attorney, his family, or his friends, and thereby inform them of his whereabouts, the circumstances of his imprisonment, and to seek advice.

10. On November 20, 1965, James Fortson was brought before A.B. Blackwell who read the affidavits, shown as Exhibits A and B, to James Fortson and proceeded to try him for the offenses alleged therein. There was no reasonable basis or probable cause to proceed against James Fortson, the same cause being that under color of law and pursuant to a conspiracy, the Defendants, acting to deny James Fortson his civil rights and liberties, including:

(a) reasonable time for continuance in order to contact his friends, parents or his attorney, known to the Defendant.

(b) A preliminary hearing to determine and to establish whether or not there was probable cause for both the arrest and for the commission of the offense.

(c) the right to counsel.

(d) the right to raise defenses, objections, and motions.

(e) the right to prove his innocence.

(f) the right to be tried by a jury of his peers.

(g) the right to post a bond or to be released on his own recognizance before conviction and after conviction.

(h) the right to be heard by a Judge that is a member of the Florida Bar.

(i) the right to present motions after the judgement.

11. Without probable cause or reasonable basis for this sentence, but acting under color of law and pursuant to the conspiracy herein stated, A.B. Blackwell sentenced James Fortson to be committed to the Gadsden County Jail for sixty days, for open profanity and for being drunk as shown in Exhibit "C" herein attached, although said law allows 30 days only for profanity, such illegal commitment not mere error.

12. James Fortson was taken by Robert Hathcock to the County Jail and then, acting again under color of law to deny the civil rights of James Fortson and exceeding his authority, brought James Fortson to W.H. Summerfield Superintendent of the Gadsden County Prison Stockade, who took James Fortson into said institution, said institution established for the punishment of prisoners at hard labour, such commitment of James Fortson not being made in error, but being under color of law and in conspiracy to deny the civil rights and liberties of James Fortson. James Fortson was then placed in that portion of the Gadsden County Prison Stockade, said portion of said stockade, being segregated according to race in that white male prisoners are housed separately from Negro male prisoners, all in accordance with the prpvisions of F.S. 950.05 - 950.08. The Defendants are actively engaged in the enforcement and execution of the said statutes. Also, James Fortson, along with other prisoners of the Negro race, are treated differently from prisoners of the white race, in that Negro prisoners are worked at hard labour on the County roads, under a gun, whereas white prisoners are given soft, effeminate type jobs within the confines of the stockade. Also white prisoners eat in dining quarters separate from the dining quarters of the Negro prisoners, white prisoners being allowed the invaluable privilege of using china ware whereas Negro prisoners are required to use and eat from tin plates. Among other privileges denied Negro prisoners because of race, are that white prisoners are provided clean bedding including cotton and wool blankets, whereas Negro prisoners must use dirty, soiled and worn World War II army blankets.

13. The aforesaid acts of the Defendants herein constitute a violation of the Constitution and Laws of the United States of America, in that the Plaintiff is deprived by the Defendants of his right to be secure against false arrest, false imprisonment, arbitrary and unreasonable search and seizure, of the freedom of association and movement, and his right not to be deprived of his life, liberty and property without due process of law, all in violation of the 14th Amendment to the United States Constitution and title 23, United States Code, Sections 1343 (3) and title 42 of the United States Code, Section 1983. As the direct and approximate result of the aforesaid acts of the Defendents, and each of them, the Plaintiff, James Fortson, has suffered, and is suffering and continues to suffer great bodily and mental anguish and he has lost, is losing, and shall lose in the future, mental health, by reason of his being so persecuted by the Defendants and officials of the State of Florida, because of race, as a result of the foregoing acts of the Defendants.

14. F.S. 950.05 - F.S. 950.08 inclusive are unconstitutional, both on their face and as applied to the Plaintiff and the members of his class in that they deny him due process of law, the equal protection of the law, and the privilege and immunities as guaranteed to him by the United States Constitution.

15. The Defendants are aware of the unconstitutionality of these statutes but continue to segregate the Plaintiff and all other prisoners similarly situated according to race, in order to deprive and deny to the Plaintiff, and all persons similarly situated, their constitutional rights, and to brand them with a badge of cast inferiority long since outlawed by the 13th and 14th Amendments to the United States Constitution. Therefore, the continued incarceration of persons convicted of crimes in segregated public facilities is a cruel and unusual punishment prohibited by the United States Constitution.

16. Gadsden County is a County in North Florida, whose economy is based on the conspiracy to exploit the labour of the Negro, enforced by the denial of equal protection of the laws by officials of the State of Florida. The Attorney for the Plaintiff herein and the father to the Plaintiff herein are known to the Defendants for advocating the exercise of civil rights by the Negro in Gadsden County. Choosing their victim, James Fortson, the Defendants, and each of them, in violation of title 42, United States Code, Section 1985 (2) did conspire and agree among themselves with other person or persons

whose names are presently unknown to the Plaintiff, for the purpose of impeding, obstructing, or defeating the due course of justice, in the State of Florida, with intent to deny the Plaintiff of equal protection of the law.

17. In furtherance of object of said conspiracy, one or more of said Defendants, did or cause to be done, the acts as set forth in the preceding paragraphs of this complaint and in violation of title 42 of the United States Code, 1985 (3) did thereby injure Plaintiff and his person and deprive him of having or exercising his rights, privileges under the Constitution of the Laws of the State of Florida..

§ 17.04

18. F.S. 856.01 and F.S. 847.06 are unconstitutional on the face and as applied.

(a) The said statutes are too vague, indefinite and uncertain for failing to provide an ascertainable standard of guilt and to set forth the bounds of the forbidden, thereby denying notice of conduct which is to be avoided under law to potential defendants and allows unlimited discretion to the Sheriff, Prosecutor, and Judges, making a mockery of the concept of a Government of Laws and not of men.

(b) Freedom of speech and even the freedom to drink are those liberties existing before government and therefore are protected by the 14th Amendment to the United States Constitution, and the above said statutes impose punishment as if the aforesaid liberties are mere privileges to be licensed by the State and for these reasons the above statutes are unconstitutional.

19. Unless the Defendants are enjoined from executing and enforcing the aforesaid Florida Statutes, the Plaintiff and others will suffer irreparable injury for which the Plaintiff has no adequate remedy at law.

20. The State conviction, commitment, punishment for 60 days beginning November 20, 1965, has been and is continuing to be in complete disregard of the constitutional rights as described herein and that a Federal Writ of Habeas Corpus is the proper efficient means of preserving the Plaintiff's rights, liberties and privileges, without such rights, liberties and privileges becoming moot and thereby suffering irreparable harm and injury.

21. James Fortson, because of his poverty, cannot pay or give security for the payment of fees, legal expenses, and costs in this matter, including the cost of certified or other copies of any documents which may be required to

be filed by him in this cause and still be able to provide himself with the necessities of life.

WHEREFORE, the Petitioner prays for the following:

1. That the Petitioner may be allowed to proceed in forma pauperis.

2. That an order to show cause issue from this Court and that the matters and things herein contained be enquired of by the Court, and that, upon said inquiry being had and determined, find that there was no probable cause for restraint and deprivation of Petitioner's liberty, the Petitioner be discharged from confinement.

3. That an injunction issue pending the final outcome of this action restraining all of the Defendants hereof, their employees, servants, attorneys, successors, and all persons in active concert and participation with them or persons acting under their direction and control from enforcing and executing the above said Florida Statutes, and to operate any publicly owned and operated public facility or other place under their supervision or control which shall result in discrimination against any person because of race or color.

4. That an injunction issue pending the final outcome of this action restraining the Defendants herein, and their agents, servants, employees, attorneys, successors in office, and all persons in active concert and participation with them who receive notice of this order as follows:

    (1) From molesting, interfering with, surveying, interrogating, searching, arresting, threatening to arrest, prosecuting or threatening to prosecute, or participating in the prosecution of the Plaintiff.

    (2) From harassing, threatening, intimidating, punishing the Plaintiff, by any of the following acts and practices.

        (a) Unlawful search of his person, automobile, dwelling.

        (b) Subjecting him to verbal abuse, including cursing , , insults, name calling, and threats.

(c) Subjecting Plaintiff to assault, beating, other physical attack or abuse.

(d) Subjecting Plaintiff to coercive and abusive interrogation.

(e) Subjecting Plaintiff to unlawful arrest for interrogation or for searching, or for investigation, or upon mere suspicion.

(f) Subjecting person under arrest or in custody to discriminatory treatment or administering punishment of any kind, including holding such persons in communicado or refusing to advise them of the charges made against them, or to check them before a magistrate or proper officer without counsel, or subjecting them to abusive or coercive interrogation, or capriciously refusing to accept tenders or bail.

5. The Plaintiff further prays that this Court retain jurisdiction of this case for the purpose of enforcing any orders issued herein and for such other orders and proceedings as may become necessary in connection therewith.

6. The Plaintiff prays for damages of all Defendants, jointly and severally, in the sum of $100,000, the cost of this action, and reasonable Attorney fees as shall be determined by this Court, and for such other reliefs as may be just and proper in the premise.

The undersigned, first being duly sworn, deposes and says that he is Attorney and has prepared the Complaint herein, and that the facts set forth therein, are true according to his information and belief.

John D. Due, Jr.

Subscribed and sworn to before me
this day of December, 1965.

Notary Public

JOHN D. DUE JR.
and CARL RACHLIN
540½ West Brevard Street
Tallahassee, Florida
222-2317

By

John D. Due, Jr.
Attorneys for Plaintiff

127 N. W. 6 Avenue
Gainesville, Florida
May 26, 1966

As provided in Section 102.166, Florida Sta
I, Oran "King" Roberts, of Alachua County, Flori
believe the election returns from Precinct No. 7
the May 24 election, 1966, are erroneous.

I hereby protest the canvass of such returns
the Alachua County Canvassing Board. The basis f
this protest is that the requirement for grouping
candidates in Section 100.071, Florida Statutes, w
not properly followed.

I was a candidate for Democratic Committee Ma
in Precinct 7 for the Group 2 seat. No other candi-
date qualified for the Group 2 seat. One candidate
[illegible] [illegible], filed for the Precinct 7 Group 1
seat. The names of two men, William A. Folds, Jr.
and Jack [illegible], were placed on the ballot, al-
though they did not qualify for any group seat. I
object to the fact that I had to run in opposition
to a Group 1 candidate and two men who did not quali-
fy for the Group 2 seat.

Since I was the only one to qualify for the
Precinct 7 Group 2 seat, I request that I be declared
Democratic Committee Man for the Precinct 7 Group 2
seat as unopposed.

Oran "King" Roberts

Precinct 7
Alachua County

Witnesses:

313 S.W. 7 Terrace
Gainesville, Florid
May 26, 1966

As provided in Section 102.166, Florida Sta I, Savannah [illegible]. Williams, of Alachua County, Flori believe the election returns from Precinct No. 25 the May 24 election, 1966, are erroneous.

I hereby protest the canvass of such returns the Alachua County Canvassing Board. The basis f this protest is that the requirement for groupin candidates as provided in Section 100.071, Florida Statutes, was not properly followed.

I was a candidate for Democratic Committeewo in Precinct 25 for the Group 2 seat. Laura [illegible] C also qualified as a candidate to run in Precinct 2 the Group 2 seat. The other two candidates, Carol Thomas and Helen Cubberly Ellerbe, each qualified candidates for Precinct 25 Group 1 seats. The ball failed to carry group designations; therefore, I ob to the fact that I had to run in opposition to the Group 1 candidates.

Savannah [illegible]. Williams

Precinct No. 25
Alachua County

Witnesses:

937 N.W.
Gainesvil
June 8, 1

Mr. John Due
c/o Mr. George Ransaw
3960 Brookwood Ave.
Indianapolis, Indiana

Dear John:

From the enclosed material, it will be obvious we have been busy here in Gainesville. We have deci that a question on the proper procedures for qualify and electing party committeemen and women should be into the courts. Suites were filed here in Alachua C at 11:27 p.m. June 4, just before the midnight deadl

At present, there is no attorney handling the ca described in the enclosures. The suites were filed a certain amount of advice, but without an attorney. [illegible] here is hoping that you will take the cases. Two the defendants, Carol and Albert, are waiting to he you will be representing the plaintiffs.

[illegible] over a point of [illegible] that is badly [illegible] cases should prove inter to anyone who is concerned with rights of the individual. Practices seem to vary over the state and from time to ti (even day to day), within one county. We have good reas to believe that the law does require group designation, this practice is not followed consistently. The Attorney General's office, according to the substance of a letter [illegible] Michael [illegible], has expressed an affirm opinion. We were told by Tom Adam's office, via telephone, that they advise election officials to use groups according to law, but that there is a great inconsistency in practice.

Summons were issued yesterday and should be served today or tomorrow. We are rather confident that at least 3 of the summons will not be answered until about June 24 even June 27 or 28. We hope that you will be back by the

Again, everyone hopes you will take the cases. Let know your decision. Incidentally, we have ten Negroes on the Alachua County Democratic Committee and expect to force the appointment of others.

Sincerely yours,

Paul G Hahn

Paul G. Hahn

[illegible]

enclosures

Phone 222-2317

JOHN D. DUE, JR.
ATTORNEY AT LAW
540½ West Brevard Street
Tallahassee, Florida

Gainesville
Rent
Strike

make
file

JUL 13 1966

June 9, 1966

Dear Carl,

The people do not want to move, in despite of my advice , until they receive notice to show cause why not to be evicted.

My case Friday is on different setfo facts. His employer was to have paid rent.

John

(PUBLIC ACCOMMODATIONS CASE)

1964

Folder 32

Historical Society Of Wisconsin

Please Retain Original Order

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

BRENDA JEAN FOUNTAIN, et als. :
:
vs. :
:
CITY OF HIGH POINT and :
KEY THEATRES :

No. C-119-G-63

O R D E R

This cause came on to be heard and the Court, after considering the complaint and the answers of the defendants and the representations of counsel in open court, finds that the Defendant Key Theatres, Incorporated, has integrated its facilities and that all persons are admitted to the Paramount Theatre operated by Key Theatres, Incorporated, without regard to race or color, and that the said defendant has signified its intention of continuing to admit all patrons to its facilities without regard to race or color.

It is therefore ORDERED that this action be removed from the active docket of the Court and that the plaintiffs have and recover their costs. The entry of this order is without prejudice to the right of either party to move in this action if at any time in the future there are any changes in the circumstances related in the first paragraph of this order.

Edwin M. Stanley
United States District Judge

October 16, 1964

Seen and not objected to:

F. B. McKissick
Counsel for Plaintiffs

Sammie Chess, Jr.
Counsel for Plaintiffs

Knox Walker
Counsel for City of High Point

James B. Lovelace
Counsel for Key Theatres, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

****

BRENDA JEAN FOUNTAIN, Minor by her next friend, Mrs. Miriam W. Fountain, Della Mitchell, Edna J. Tomlin, Plaintiffs	*	
vs.	*	**JUDGMENT**
CITY OF HIGH POINT, A MUNICIPAL CORPORATION OF NORTH CAROLINA and KEY THEATRES, INC. Defendants	*	#C-119-G-63

**　　**　　**　　**　　**　　**

This cause came on to be heard and being heard on the complaint and answers of the defendants and upon consideration of same and testimony taken in open court and it appearing that the defendant, KEY THEATRES, INC. has integrated its facilities and all persons are admitted to the Paramount Theatre, operated by Key Theatres, Inc., without regard to race, and it further appearing that since filing of the suit "The Civil Rights Act of 1964" has been passed by the United States Congress, also known as Public Law 88-352, it is hereby ORDERED:

1. That defendants, Keys Theatres, Inc., a corporation, and the City of High Point, a municipal corporation of the State of North Carolina, and their agents, servants, employees, lessees, licensees and all persons in active concert or participation with them be, and they hereby are, restrained and enjoined, from pursuing, enforcing, or permitting, with respect to the admission and use of the Paramount Theatre Building, any law, statute, ordinance, regulation, policy, practice, custom and usage, which denied to plaintiffs, and other Negro persons, the complete, full and unrestricted use of said facility upon an entirely equal basis with white persons, without segregation or discrimination in any form whatever as to race or color;

2. That this action shall be removed from the active docket of this Court;

3. That plaintiffs shall have their costs.

This, the_____day of__________________, 1964.

____
United States District Judge

Consented to:

____
Of Counsel for Plaintiffs

____
Of Counsel for the Defendant
Key Theatres, Incorporated

____
Of Counsel for the Defendant
The City of High Point

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

ooooooooooooooooooooooooooooo

BRENDA JEAN FOUNTAIN, Minor by her next friend, Mrs. Marian C. Fountain, Bella Mitchell, Edna S. Tonkin, Plaintiffs :

vs. : JUDGMENT

CITY OF HIGH POINT, A MUNICIPAL CORPORATION OF NORTH CAROLINA and KEY THEATRES, INC. Defendants : (C-119-G-63)

This cause coming on to be heard and it appearing to the Court that since the filing of this suit "The Civil Rights Act of 1964", also known as Public Law 88-352, has been enacted into law, and that since the passage of said Act the defendant Key Theatres, Inc., has voluntarily integrated its theatre in High Point, North Carolina, known as Paramount Theatre; and it further appearing that said defendant is of the opinion that the provisions of said Act apply to it, and has no intention of contesting the validity of said "The Civil Rights Act of 1964", and intends to comply with the provisions thereof unless and until it is declared invalid or unconstitutional by the Supreme Court of the United States, and further intends to voluntarily continue the integration of such theatre even in the event such Act is so declared invalid or unconstitutional so long as in the opinion its business is not jeopardized thereby; and it still further appearing that this action on the part of the defendant Key Theatres, Inc. is voluntary and without prejudice in the event the "The Civil Rights Act of 1964" is declared invalid or unconstitutional, but is with prejudice so long as it remains in force and effect; and it still further appearing that said defendant Key Theatres, Inc. does not admit the jurisdiction of this Court for the purpose of the pending suit, or the application to it of the statutes set forth in the complaint, but considers the issues raised in this cause moot so long as said "The Civil Rights Act of 1964" is in force and effect; and it still further appearing that all of the parties hereto desire to protect their rights in this cause in the event said Act is declared invalid or unconstitutional, and agree to the terms of this judgment:

NOW, THEREFORE, by consent of all the parties, IT IS ORDERED, ADJUDGED AND DECREED:

1. That unless and until "The Civil Rights Act of 1964" is declared invalid or unconstitutional by the Supreme Court of the United States, the defendants, Key Theatres, Inc., a corporation, and the City of High Point, a municipal corporation of the State of North Carolina, and their agents, servants, employees, lessees, licensees and all persons in active concert or participation with them, be, and they hereby are, restrained and enjoined from pursuing, enforcing, or permitting, with respect to the admission and use of the Paramount Theatre building in High Point, North Carolina, any law, statute, ordinance, regulation, policy, practice, custom and usage, which denies to plaintiffs and other Negro persons, the complete, full and unrestricted use of said facility upon an entirely equal basis with white persons, without segregation or discrimination in any form whatever as to race or color.

2. That in the event said "The Civil Rights Act of 1964" is declared invalid or unconstitutional by the Supreme Court of the United States, then and in such event the injunction hereby granted shall cease and terminate, and either of the parties may have the right to reinstate this action, or take such other action as they may deem proper to enforce any rights they may deem themselves to have with reference to the matters and things alleged in the pleadings in this cause.

3. That this action shall be hereby removed from the active docket of this Court.

4. That the plaintiffs shall recover from the defendants the court costs, which shall not include the allowance of any attorney fees.

This ________ day of August, 1964.

____
UNITED STATES DISTRICT JUDGE

Consented To By:

____
Counsel For Plaintiffs

____
Counsel For Plaintiffs

LOVELACE AND HARDIN

By James B. Lovelace
Attorneys for Key Theatres, Inc.

Knox Walker
Attorney for City of High Point

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO, NORTH CAROLINA

HERMAN AMASA SMITH, CLERK

SEP 14 REC'D

9 September 1964

Mr. F. B. McKissick
213-1/2 West Main Street
Durham, North Carolina

Mr. John Langford
High Point, North Carolina

Mr. Carl Rachlin
280 Broadway
New York 7, New York

Re: Brenda Jean Fountain et als vs. City of High Point et al, C-119-G-63

Gentlemen:

After having received a copy of your letter dated 4 September addressed to Mr. Lovelace, the Court asks that this matter be set for a conference preliminary to the trial of the action.

The parties will please accept this letter as notice of such a conference here in Greensboro 16 October 1964 at 10:00 a.m.

Cordially yours

Herman Amasa Smith

Herman Amasa Smith

HAS:djs

cc: Mr. Knox Walker
City Attorney
High Point, North Carolina

Mr. James Lovelace, Attorney
High Point, North Carolina

10/10

September 29, 1964

Floyd B. McKissick, Esq.
213½ West Main Street
Durham, North Carolina

Dear Floyd,

With regard to the Brenda Jean Fountain vs. High Point case, a copy of which was sent to us, please advise what you want from us in this regard and we shall be happy to comply with same.

Would you like me to be at the conference on October 16th?

Kindest regards,

Carl Rachlin
General Counsel

CR:bdl

North Car.
temp/file
case

[illegible] 5 1964

LAW OFFICES OF
McKISSICK & BURT
213½ WEST MAIN STREET
DURHAM, NORTH CAROLINA 27701
OFFICE 682-8106

F. B. McKISSICK
M. C. BURT, JR.

October 2, 1964

Mr. Carl Rachlin
Congress of Racial Equality
38 Park Row
New York 38, New York

Re: FOUNTAIN vs. HIGH POINT (City of)

Dear Carl:

Thank you for your note of September 29, 1964. I do not think that it will be necessary for you to come down for this hearing in that, since the passage of the Civil Rights Act the question has become moot.

We have attempted to have a consent judgment entered but counsel for the Paramount Theatre refuses to consent to same. The case has been put on the docket for the entering of judgment. Enclosed, you will find a copy of the judgment which Sammie Chess and I have prepared for presentation to the court and judgment presented by counsel for defendants. After reading these two judgments I think you will understand our reason for not signing judgment prepared by defendants' counsel.

Since it appears that this case can be concluded by local counsel and we do not have any conflicts at present I do not think that your presence will be necessary. Thanks very much for your willingness to come down and the thought behind it is something we sincerely appreciate.

Yours very truly,

F. B. McKissick

FBMcK:ls

SEDFRE

FREEDOM RIDERS CASES, JACKSON, MISS., 1963-1965

Box 36
Folder 33

Historical Society of Wisconsin

Please Retain Original Order

Core
Mississippi

October 15, 1963

Professor Norman Dorsen
New York University
School of Law
Washington Square
New York 3, New York

Dear Norman:

As you know, I am and have been tremendously concerned with the great amounts still held by Mississippi as bail ever since the Freedom Rides. Henry Thomas' case, the first case on appeal, is not yet through the Mississippi courts.

It is my thought to begin an action in the Federal Court to get back the bail money. This would be based on the idea that since Taylor v. Louisiana, where the statute and the facts are very similar, convictions would, almost inevitably, be reversed.

Holding our money, large sums for each person, is taking property without due process of law under such circumstances where the Supreme Court has almost decided the merits of the case.

What do you think of this? I realize it is novel, but I am anxious to try again. Would it be absolutely ridiculous, as part of the relief sought, to have the federal court issue an order to the state court to reverse the convictions? I would appreciate your thoughts.

By the way, there is a more general problem which you and your students could devote some very useful time to. As you know better than I, law school courses are pretty good on procedure but very weak on federal jurisdiction. While some of the sections in Titles 28 and 42 are obvious, I am sure there are sections which do not occur even to the experienced constitutional attorney, as I like to think I am. If a codification of the sections that would be important to a civil rights lawyer were laid out, this would be of inestimable value to attorneys all over the United States.

I hope you can undertake this.

With best regards,

CR:cr
cc: James Farmer
Marvin Rich
Gordon Carey

CARL RACHLIN

November 20, 1963

Leonard Rosenthal, Esq.
242½ East Capital
Jackson, Mississippi

Dear Leonard:

Enclosed is our check from CORE to your order for $50.00 on account of one of your bills. We are eternally grateful.

I spoke to Miss Herbert and it seems the papers will be in New Orleans on December 1st.

Regards,

CARL RACHLIN

CR/hm
Encl.

CHESTER A. BRUVOLD
ATTORNEY AT LAW
404 WCCO BUILDING
625 2ND AVENUE SOUTH
MINNEAPOLIS 2, MINNESOTA
FEDERAL 8-5247

December 6, 1963

CORE
38 Park Row
New York 38, New York

Attention Mr. Rochlin

Mr. Rochlin:

I have been requested to accept a substitution for Marschman Watson as a trustee of the Minnesota Freedom Riders Bail Fund. There is a balance at the present time in this fund and some of the persons who made loans to the fund have been inquiring about a return of the whole or some part of their money.

What I am writing to you about is to inquire as to whether your organization has any idea as to how long the money will be held in Jackson, Mississippi, on the bail funds of Zev Aelony, Robert Baum, Marvin Davidov, David Morton, Claire O'Connor, and Eugene Uphoff. Any information that you have on this matter would be greatly appreciated.

Sincerely,

Chester A. Bruvold

CAB:lb

Corr Genl

December 23, 1963

Chester A. Bruvold, Esq.
404 WCCO Building
625 2nd Avenue South
Minneapolis 2, Minnesota

Dear Mr. Bruvold:

Your letter was delayed in transmittal to me. At this time I cannot advise you when the bond money will be released for the persons referred to in your letter of December 6th.

The matters are crawling through the Mississippi courts. Eventually we expect to win based upon the decision in Taylor v. Louisiana, but the delay is almost unbearable.

Sincerely,

CARL RACHLIN

CR/bs
cc: Mr. Richard Haley
Mr. Marvin Rich

Lois Chaffee

RECEIVED
DEC 23 1963
VLADECK & ELIAS

Columbus Ms
80 Weaver
Jail
P.L. Dayland

Dear Mr. Rachlin:

Enclosed is copies of an appearance bond as requested. I am sending one copy partially filled in with the correct dates thereon which I thought you might not know.

Your friend,

L. H. Rosenthal

78

L. H. Rosenthal

Nat'l Council Churches

RECEIVED
NOV 12 1963
VLADECK & ELLI

IN THE SUPREME COURT OF MISSISSIPPI
CASES SET FOR HEARING, JANUARY 1964

MONDAY, JANUARY 6TH, 1964 ----------9:30 A.M.
43,039 Miss. State Highway Commission vs. Ray Morgan, et ux
42,867 Mutual Life Ins. Co. vs. Mrs. Leone L. Smith
42,868 George Dempsey Brewer vs. Geer Melkus Construction Co.
42,869 Benefit Trust Life Ins. Co. vs. Mrs. Vera E. Lee, et al

CRIMINAL
42,486 Geo. A. Gordon alias Doc Smith;Circuit;Lowndes;Rape;Death
42,951 Grady H. Donald;Circuit;Hinds;Breach of Peace; 60 das. $200.Fine
42,956 Ernest Patton,Jr " " " " " " "
42,960 James L. Bevel " " " " " " "
42,983 James L. Farmer " " " " " " "
42,984 Peter M. Ackerberg " " " " " " "
42,985 Alexander M. Anderson " " " " " "
42,987 Henry J. Thomas " " " " " " "

MONDAY, JANUARY 13TH, 1964----------9:30 A.M.
42,870 Daniel J. Cipriani vs. Mrs. Willie K. Miller
42,871 Forest Constructors Inc. et al vs. Woodward W. Tadlock
42,872 Midland Shirt Co. & U.S.F. & G. Co. vs. Ava Dee Ray
42,873 Henry Hennington,d/b/a Lake Shady vs. Carol Curtis,Minor,etc.
42,874 Nationwide Mutual Ins. Co. vs. Charles Tillman, et ux

CRIMINAL
42,958 Pauline E. Knight;Circuit;Hinds;Breach of Peace;60 das-200 Fine
42,963 William E. Harbour " " " " " "
42,968 Charles D. Myers " " " " " "
42,971 Lester G. McKinnie " " " " " "
42,966 Sandra M. Nixon " " " " " "
42,970 John J.M. McDonald " " " " " "
43,031 Carolyn Yvonne Reed " " " " " "

MONDAY, JANUARY 20TH, 1964-----------9:30 A.M.
42,875 H.L.Howell d/b/a/ etc. vs. Canal Insurance Co. et al
42,876 West Brothers, Inc. vs. Mrs. Darlene Clark
42,877 Central Optical Merchandising Co. vs. Est.MorrisB.Lowe,Decd.etc
42,878 Pellerin Laundry Machine Sales,et al vs. Mrs. Annie Ree Jeffcoat
42,879 Miss. State Highway Comm. vs. T.C.Rhymes

CRIMINAL
43,032 Raymond B. Randolph,Jr.Circuit;Hinds;Breach of Peace-4Mos-fine
42,961 Terry S. Perlman " " " " " "
42,967 Edward J.Bromberg; " " " " " "
42,957 Katherine A. Pleune " " " " " "
42,973 David K.Morton " " " " " "
42,980 Zev Aelony " " " " " "
42,982 Claire O'Connor " " " " " "

MONDAY, JANUARY 27TH, 1964-----------9:30 A.M.
42,880 Miss. State Highway Comm. vs. John Jacobs
42,888 Mrs. Mabel P. Rawson vs. Illinois Central R.R.Co.
42,889 Annie Pearl Hinton etc. vs. Eddie B. Schaffer
42,890 Kenneth C. Layton, et al vs. Shirley Edward Cook, etc.
42,891 Sara P. Caldwell Extrx Est J.H.Caldwell Decd.vs.Hartford Acc. & Indemnity Co.
42,892 W.E.Edwards vs. Elton Murphree

CRIMINAL
42,978 Robert E. Filner;Circuit;Hinds;Breach of Peace-4Mos-$200Fine
42,999 Elizabeth Adler " " " " " "
42,975 Grant G. Muse,Jr " " " " " "
43,029 Thomas V.Roland " " " " " "
43,034 Lestra A. Peterson " " " " " "
43,036 Joan F. Pleune " " " " " "

NOTE: If Appellant fails to file Assignment of Errors and Brief at least thirty days prior to date case is set for hearing, the Court may dismiss such case, of its own motion.

Respectfully submitted,
Tom Q. Ellis, Clerk
Julia Kendrick, D.C.

Released 11/6/1963

Freedom Rides

Listing of source of Bond Funds
Freedom Rider Cases Adjudicated
avg April 28, 1965

p. 1

Name	Amount	Acct No	Source of Funds	
① Zev Aelony	500.00	1271	A.E. Norman	
	1000.00	1275	Norman Foundation	①
② James L. Bevel	2500.00	1272	CORE	
③ Alexander Anderson	1000.00	1277	U.A.W.	
	500.00	—	Methodist Church (Non-Core)	
④ Ed J. Bromberg	500.00	1271	A.E. Norman	
	1000.00	1271	A.E. Norman	
⑤ John Copeland	1000.00	1271	A.E. Norman	
	500.00	—	NCLC (Non-Core)	
⑥ Marvin Davidov	500.00	1277	U.A.W.	
	1000.00	1275	Norman Foundation	①
⑦ Rev. Grady H. Donald	1000.00	1271	A.E. Norman	
	500.00	—	NCLC (Non-Core)	
⑧ James Farmer	1500.00	1272	CORE	
⑨ William Harbour	500.00	1271	A.E. Norman	
	1000.00	1275	Norman Foundation	
⑩ Pauline Knight #	500.00	1271	A.E. Norman	
	1000.00	1275	Norman Foundation	
⑪ Joseph McDonald	500.00	1272	CORE	
	1000.00	—	Legal Defense Fund (Non-Core)	
⑫ Lester McKinnie	500.00	1274	Carl Rachlin, Esq.	
	1000.00	—	Legal Defense Fund (Non-Core)	
⑬ David Morton	500.00	1275	Norman Foundation	
	1000.00	—	Legal Defense Fund (Non-Core)	
⑭ Rev. Grant H. Muse, Jr. #	500.00	1275	Norman Foundation	
	1000.00	—	Legal Defense Fund (Non-Core)	
⑮ Charles David Myers	500.00	1275	Norman Foundation	
	1000.00	—	Legal Defense Fund (Non-Core)	
⑯ Sandra Nixon	500.00	1275	Norman Foundation	
	1000.00	—	Legal Defense Fund (Non-Core)	
⑰ Ernest Patton	500.00	1274	Carl Rachlin, Esq.	
	1000.00	—	Legal Defense Fund (Non-Core)	

① $500.00 - Minnesota [illegible] [illegible] Fund.

Power of attorney [illegible] on file.

Listing of Source of Bond Fund
Freedom Ride Cases Adjudicated
as of April [illegible]

P. 2

Name	Amount	Acct #	Source of Funds.
(18) Terry Susan Perlman #	50000	1274	Carl Rachlin Esq
	100000	—	Legal Defense Fund (Non-CORE)
(19) Joan P Pleune	50000	1274	Carl Rachlin Esq
	100000	—	Legal Defense Fund (Non-CORE)
(20) Raymond Randolph	50000	1274	Carl Rachlin Esq
	100000	—	Legal Defense Fund (Non-CORE)
(21) Carolyn Reed	50000	1274	Carl Rachlin Esq
	100000	—	Legal Defense Fund (Non-CORE)
(22) Thomas V. Roland #	50000	1275	Norman Foundation
	100000	—	Legal Defense Fund (Non-CORE)
(23) Henry J Thomas #	200000	1271	A. E. Norman
(24) Kathleen Pleune	50000	1274	Carl Rachlin Esq
	100000	—	Legal Defense Fund (Non-CORE)
(25) Peter Ackerberg	50000	1271	A. E. Norman
	100000	—	Posted own bond
(26) Clare O'Connor	50000	1274	Carl Rachlin Esq
	100000	—	Legal Defense Fund (Non-CORE)
(27) Robert Filner	100000	1271	A. E. Norman
	50000	1277	U.A.W.
(28) Elizabeth Adler	50000	1274	Carl Rachlin Esq
	100000	—	Personal
(29) Lestra A. Petersen	50000	1275	Norman Foundation
	100000	—	Legal Defense Fd. (Non CORE)

WHEREAS, CONGRESS OF RACIAL EQUALITY, INC., heretofore furnished us with the amount of money required by the State of Mississippi to cover the cash bonds under which we were released from jail; and

WHEREAS, the amount of such cash bonds, while issued in our respective names, always has been the property of CORE; and

WHEREAS, it is our intention to return the said amount to CORE upon its receipt by us from the State of Mississippi;

NOW, in order to expedite the transfer of said funds from our names into that of CORE, we do agree, and authorize CORE to do the following:

1. To accept and receive in our name and stead any and all checks given by the State of Mississippi in return of the amount previously deposited by us as cash bonds so that we would be released from jail. In the event such refunds are made by check issued in our names as payees, we authorize and direct CORE to endorse our names on said checks, obtain the proceeds thereof [illegible] and use the same in any manner that CORE may determine appropriate.

This authorization shall be irrevocable.

Dated, October 21, 1965.

Signed Richard Haley

S E A L

Witness ____________________

____

Sworn and subscribed to before me on the ________ day of ________, 1965.
Notary Public for the County of __________ of the State of__________.
My commission expires ____________________.

Signed ____________________

Schedule of Freedom Rider Cases
Jackson, Mississippi

10/21/65

Name	Amount	Source + Comments
Ackerberg, Peter	50000^	CORE - A.E. Norman
	100000	Personal Bond
Adler, Elizabeth	50000^	CORE - Carl Rachlin, Esq.
	100000	Personal Loan to CORE (#3569) (Repaid)
Aelony, Zev	50000^	CORE - A.E. Norman
	100000^	" Norman Fdn.
		Note: $1,000.00 to be repaid to Minnesota Freedom Riders Fund (#3569)
Anderson, Alexander	100000^	CORE (UAW Acc't)
	50000	Bishop Charles Golden 1908 Grand Ave Nashville, Tenn.
Armstrong, Thomas	150000^	CORE (UAW Acc't.)
Austin, Eddie Jones	50000^	CORE - A.E Norman
Baer, Byron M.	50000^	CORE - Carl Rachlin, Inc
	100000^	CORE - Norman Fdn
		(Note: Repay personal loan - $1000.00 made to CORE - # 3569)
Baker, William	50000^	CORE - A.E. Norman
Bassford, Abraham	150000^	CORE - A.E Norman
Baum, Robert	50000^	CORE - A.E Norman
	100000^	CORE - Norman Fdn.
Bell, Larry Eugene	50000^	CORE - Carl Rachlin Esq.
	100000	Escrow #665, First Western Bk. & T. Los Angeles, Calif. (#3506)
Bigcott, Marshall	50000^	CORE - Carl Rachlin Esq.
	100000	L. D. F. Inc.

Schedule of Freedom Riders.
Jackson, Mississippi

	Amount	Source - Comments
Berman, Leora	50000	CORE - A E Norman
	100000	CORE
		Note: (#3569) Repay as follows
		10000 Elliot Murray
		5000 Faith Rich
		85000 Leo Berman
Bevel, James	350000	CORE
	400000	L.D.F. Inc.
Blevins, George M.	150000	CORE - Norman Fdn.
		Return $1000.00 to Escrow #665
		First Western Bk. L.A. Calif. (#3506)
Blue, Mildred	150000	CORE - Norman Fdn.
Bromberg, Ed. J.	150000	CORE - A. E Norman
Brown, Luvaughn	50000	CORE
Clark, Fred	50000	CORE - Carl Rachlin, Esq.
	100000	CORE - Norman Fdn.
Copeland, John	100000	CORE A. E Norman
	50000	NCLC
Cox, Charles	50000	CORE - A. E. Norman
Davidov, Marvin	50000	CORE - U. A. W
	100000	" Norman Fdn.
		Note: $1000.00 - return to Minnesota Freedom Riders Fund
Davis, Jesse	150000	CORE - Norman Fdn.
Dendy, Alfonso	100000	CORE - Norman Fdn.
	50000	- Personal Bond
Donald, Rev. Andy	100000	CORE - A. E. Norman
	50000	Return to Rev. Donald for repayment of NCLC Loan.

Approved By

Schedule of Freedom Rider Cases
Jackson, Mississippi

	Amount	Source - Comments
Eisenberg, Marilyn	500.00	SCLC - A E Norman
	1000.00	Escrow Acct #665 - First Nat'l Bk. L A Calif. (#3506)
Farmer, James	1500.00 ^	CORE
Feingold, Miriam	500.00	S C L C
	1000.00 ^	CORE - Norman Fdn
Filner, Robert	500.00 ^	CORE - U. A W account
	1000.00 ^	CORE - A. E. Norman
Floyd, Ralph	500.00 ^	CORE - U A W
	1000.00 ^	" Norman Fdn.
Fuller, Winston	500.00 ^	CORE - Carl Rachlin, Esq
	1000.00	" Escrow Acct #665 - (See above) #3506
Gerbac, Joseph	500.00 ^	CORE - A E Norman
	1000.00	" Escrow #665 (See above) #3506
Givens, Samuel	500.00 ^	CORE - Carl Rachlin, Esq
	1000.00 ^	" Norman Fdn.
Gordon, Albert F	500.00 ^	CORE - A E Norman
	1000.00 ^	" Norman Fdn
Green, Miller G	500.00 ^	CORE - U A W.
	1000.00 ^	" A E Norman
Green, Robert L	500.00 ^	CORE - U. A W
	1000.00 ^	" Norman Fdn.
Griffin, Frank	500.00 ^	CORE - A E. Norman
	1000.00 ^	" Norman Fdn.
Grubbs, Michael	500.00 ^	CORE - Carl Rachlin, Esq
	1000.00	" Escrow Acct #665 - (See Above #3506)
Haley, Richard	500.00 ^	CORE

[illegible] A. C. Case
Jackson, [illegible]

Amount – Source – Comments

Hamilton, Jack	500 00 "	CORE – A. C. Norman
Hansen, William	500 00 "	CORE – Carl Rachlin, Esq.
	1000 00	Escrow #665 (see above) #3506
Harbour, William	500 00 "	CORE – A. C. Norman
	1000 00 "	" Norman Fdn
Hayes, Jane Lee	500 00 "	CORE – A. C. Norman
	1000 00 "	" Norman Fdn
Heller, Robert	500 00 "	CORE – A. C. Norman
	1000 00 "	" Norman Fdn
Hirschfeld, Elizabeth	500 00 "	CORE – A. C. Norman
	1000 00 "	" Norman Fdn
Horne, Erma Lee	500 00 "	CORE – A. C. Norman
	1000 00 "	" Norman Fdn
Jackson, Glenda	500 00 "	CORE – Norman Fdn
Jackson, Reginald	500 00 "	CORE – Carl Rachlin, Esq.
	1000 00	Escrow #665 (#3506) See Above
Kaufman, Alan	500 00 "	CORE – A. C. Norman
	1000 00	Escrow #665 (See above) Acct #3506
Knight, Pauline	500 00 "	CORE – A. C. Norman
	1000 00 "	" Norman Fdn.
Lee, Eugene	500 00 "	CORE – A. C. Norman
	1000 00 "	" Norman Fdn
Leons, William	500 00 "	CORE – A. C. Norman
	1000 00	U.C.L.A. Student Fund
Lillard, Norma	500 00 "	CORE – Norman Fdn
[illegible] (see page)	1000 00	L. D. F. Inc.
McDonald, Joseph	500 00 "	CORE
	1000 00	L. D. F. Inc.

Schedule of Freedom Bail Bond
Jackson, Mississippi

	Amount	Source - Comments
McKinnie, Lester	500.00 1000.00	CORE - Carl Rachlin L.D.F. Inc
Mattison, Robert	500.00 1000.00	CORE - Norman Fdn L.D.F. Inc
** McConnell, Paul D	500.00 1000.00	CORE - Norman Fdn. " A. C. Norman Note $400.00 to be returned to McConnell (#3569)
McNair, Landy	500.00 1000.00	CORE - Carl Rachlin, Esq L.D.F. Inc
Manning, Eddora	500.00 1000.00	CORE - Norman Fdn. L.D.F. Inc.
Matzkin, Norma	500.00 500.00 500.00	CORE - Carl Rachlin & " Norman Fdn "
Miller, Robert	500.00 1000.00	CORE - Norman Fdn L.D.F.
Mitaritonna, Rudolph	500.00 1000.00	CORE - A.C. Norman CORE (James Marshall Loan)
Maton, David	500.00 1000.00	CORE - Norman Fdn L.D.F. Inc
Moskowitz, Ruth	500.00 1000.00	CORE - A.C. Norman Escrow #665 (See Above) #3506
Muse, Rev. Grant	500.00 1000.00	CORE - Norman Fdn L.D.F. Inc
Myers, Charles	500.00 1000.00	CORE - Norman Fdn. L.D.F. Inc (Note: Posted own Bond - $1,000.00) #3569
Nixon, Sandra	500.00 1000.00	CORE - Norman Fdn L.D.F. Inc

Schedule [illegible]
Jackson, Miss [illegible]

Amount [illegible]

O'Connor, Clare	50000"	CORE Carl Rachlin, Esq
	100000	L D F Inc
O'Neil, Helen	50000"	CORE Norman Feln
Palmer, Alpha	50000"	CORE Carl Rachlin Esq
	100000"	" Norman Feln
Patton, Ernest	50000"	CORE Carl Rachlin, Esq
	100000	L D F, Inc
Pawlic, Mr Gregory	50000"	CORE - A E. Norman
	1[illegible]	U S N A Student Fund
Palmer, Philip	50000"	CORE - Carl Rachlin, Esq
	100000	Maryland [illegible] Amer. Friends Serv. Comm
Perlman, Terry Susan	50000"	CORE - Carl Rachlin, Esq
	100000	L D F Inc
Peterson, Lester	50000"	CORE - Norman Feln
	100000	L. D F. Inc
Petway, Alphonso	50000"	CORE - Carl Rachlin Esq
	100000	L D F Inc
Phillips, Wm D	50000"	CORE - Carl Rachlin. Esq
	100000"	" Norman Feln
Pleune, Joan	50000"	CORE - Carl Rachlin Esq.
	100000	L D F. Inc
Pleune, Katherine	50000"	CORE Carl Rachlin, Esq
	100000	L D. F. Inc
Posner, Philip	50000"	CORE - Carl Rachlin Esq
	100000	Lien - Temple Isaiah (L.A., Calif)
Price, Elnora	50000-	CORE - Carl Rachlin Esq
	100000	L. D F Inc

Schedule of Freedom Rider Cases
Jackson, Mississippi

	Amount	Source of Commitments
Prickard, Michael	50000^	CORE - Carl Rachlin Esq
	100000	L.D.F. Inc.
Randolph, Raymond	50000^	CORE - Carl Rachlin
	100000	L.D.F. Inc
Reed, Carolyn	50000^	CORE - Carl Rachlin, Esq
	100000	L.D.F. Inc
Richards, David	50000^	CORE - A. E. Norman
	100000^	CORE
Rogers, John C.	50000^	CORE - Norman Fdn
	100000	L.D.F. Inc
Roland, Thomas	50000^	CORE - Norman Fdn
	100000	L.D.F. Inc
Rosell, Henry	500.00^	CORE - Carl Rachlin, Esq
	100000^	" - Norman Fdn.
Rosenbaum, Marcia	50000^	CORE - Norman Fdn
	100000	L.P.F. Inc
Rosenberg, Rose	150000	Personal Funds
Rosett, Jane	50000^	CORE
	100000	L.D.F. Inc.
Ross, Joseph	150000^	CORE - Norman Fdn.
Rush, Heatcliff	50000^	CORE
	100000^	Norman Fdn
[illegible], Leon	50000^	CORE
	100000	L.D.F. Inc
Salley, Charles	50000^	CORE
	100000	L.D.F. Inc

Sheehan, [illegible]	50000 ^ CORE	
	100000	Personal Bond
Siegel, Joyce (Bradotsky)	50000 ^	CORE - [illegible]
	100000	L D F Inc
Silver, Carol	50000 ^	CORE
	100000	L D F Inc
Simmons, Obadiah	50000 ^	CORE
	100000	L D F Inc
Singleton, Robert	50000 ^	CORE
	100000	U C L A Student Fund
Singleton, Helen	50000 ^	CORE - A E Norman
	100000	Escrow #665 (See Above) #3506
Smith, Woollcott	50000 ^	CORE
	100000	Personal Bond
Steward, Richard	50000 ^	CORE
	100000	Escrow No #665 (See Above) #3506
Stoner, Harry Peter	50000 ^	CORE
	100000	L D F Inc
Taylor, John C.	50000 ^	CORE
	100000	L D F Inc
Taylor, Lavert	50000 ^	CORE - Norman Fdn
Taylor, Wayne Leslie	50000 ^	CORE
	100000	L D F Inc
Thomas, Clarence Jr.	50000 ^	CORE
	100000	L-D. F Inc
Thomas, Henry	200000 ^	CORE + A E Norman

Schedule of Freedom Riders
Jackson, Mississippi

	Amount	Source - Comments
Thomas, Willie	50000	CORE
	100000	L.D.F. Inc.
Thompson, Jean	50000	CORE - A.C. Norman
	100000	L.D.F. Inc.
Thompson, Shirley	50000	CORE
	100000	L.D.F. Inc
Thornton, Leotus	50000	CORE
	100000	L.D.F. Inc.
Thurman, Lonnie	50000	CORE
	100000	Return to Escrow #665 (See above). $35.06
Toombs, Claire	50000	CORE
	100000	L.D.F. Inc.
Townsend, Sam Joe	50000	CORE
	100000	Return to Escrow #665 (See above) $35.46
Travis, Jimmy	50000	CORE
Uphoff, Eugene	150000	CORE
Vance, Carl	50000	CORE
	100000	L.D.F. Inc
Wagoner, William	50000	CORE - Norman Fdn.
	100000	L.D.F. Inc.
Watts, Joe Jr.	50000	CORE - Carl Rachlin, Esq
	100000	CORE - Norman Fdn.
Watts, Tommy	50000	CORE - Carl Rachlin, Esq
	100000	L.D.F. Inc
White, Lula	50000	CORE - Carl Rachlin Esq
	100000	CORE - Norman Fdn.

Schedule of Freedom Riders
Jackson, Mississippi

	Amount	Source Comments
Wilson, Helene	50000^	CORE
	100000	Return to IUD of AFL-CIO
Wolfson, Jack	50000^	CORE - A E Norman
	100000	U.C.L.A. Student Funds
Wright, Clarence	150000^	CORE - Norman Fdn.
Wright, Leroy	150000^	CORE
Young, Paul	150000^	CORE - Norman Fdn.
Zuckerman, Lewis	50000^	CORE - A E Norman
	100000^	CORE - Norman Fdn.

October 27, 1965

Thomas J
Mus.

TO: George Wiley CC: Rachlin, Rich

FROM: L. Farmer

RE: Bond -- Freedom Rider Cases, Jackson, Mississippi

Discussion:

Attached are two listings showing bail bond posted in Jackson, Mississippi for the Freedom Rider Cases.

Schedule of Freedom Rider Cases: (Legal Size Schedule)

This listing is by case in alphabetical order of all those for whom CORE posted bonds, either from its own funds, or from funds which were loaned to CORE for this purpose.

The listing indicates the account assignment per CORE books, and also any other pertinent information relative to the return of bond money for that particular RIDER.

It may be noted that in a few cases the total amount of bond to be returned exceeds that posted. This occurred in the following manner. At the time of the appeal trial, and the posting of the additional bond (usually $1,000.00), the money available came from one of the Norman (either personal of Foundation) loans. In the case of these loans, the assignment was not for bookkeeping purposes only. Reports of assignments were made to the lendor with a commitment of 50/50 sharing of any losses which occurred. Subsequently, some of these Riders raised money on a loan basis for part of all of their bail, which money was in actuality used for others. However, when the bond is returned for their cases, their own personal loan to us must be repaid as well as closing out the case on the appropriate Norman Account.

Schedule of Freedom Rider Bond Loans: (Regular sized paper)

This schedule indicates loans by source of funds. It must be noted that this schedule may not be complete. It includes only those cases included in the final Report to the CORE office of cases on appeal. However, this listing may include only those cases that were in some sense CORE related..I believe for instance that their were a number of cases whose bail was supplied by the SCLC. This report indicated only three. I believe there may also be more cases whose entire funds were personally supplied.

Total amount of bail posted in cases of which CORE has acknowledge:	$196,000.00
Bail bond posted by CORE	130.000.00
Bail funds to be returned by CORE to others (approximate)	126,060.00.

It should be noted that some of the persons who made loans to CORE for bond purposes may be willing to cancel all or part of these loans.

I understand that the State of Mississipii has exacted a charge against the bond. A decision should be made where, if anywhere, this charge is transferred to the lendor of funds.

Recommendations:

1) That a review be made of bail bonds, and that letters be sent out where appropriate asking for possible cancellation of loans.

2) That a decision be made regarding the charge made by the State of Mississippi.

[1965, October 27]

CORE -- Congress of Racial Equality
38 Park Row
New York, N. Y. 10038

Freedom Rider Bond Loans -- Schedule of Loans:

A. E. Norman	$ 25,000.00
Norman Foundation, Inc. (Note: Both of these loans established on a 50/50 sharing of loss basis.) (Cases have been specifically assigned; lender received listing of cases.)	45,000.00
Carl Rachlin, Esq. (1) (Money loaned by the Legal Defense Fund to Carl Rachlin for initial bonds. Does not include appeal bonds put up later by the LDF.)	15,500.00
U. A. W. (1) (2)	5,000.00

(1) Cases assigned for bookkeeping purposes only.

(2) Return of loan may be negotiable.

Loans to be repaid immediately as money for the specific Rider involved has been released.

Escrow #665, First National Bank, Box 24727, Los Angeles 24, California	13,000.00

For: Marilyn Eisenberg
Joseph Gerbac
Alan Kaufman
Helen Singleton
Lonnie Thurman
Lawrence Bell
Winston Fuller
Michael Grubbs
Reginald Jackson
Richard Steward
Sam Townsend
George Blevins
Ruth Moskowitz

Loans to be repaid immediately as money for the Specific Rider involved has been released (con't):

Rider	Comments	Amount
Ackerberg, Peter	Repay to same	$1000.00
Aelony, Zev	See Minnesota Riders Below	
Anderson, Alexander	Return to Beishop Golden	500.00
Baer, Byron	Repay to same	1000.00*
Baum, Robert	Uphoff -- Minnesota Freedom Riders Fund	1000.00*
Berman, Leora	Return to Elliot Murray	100.00*
	Faith Rich	50.00*
	Leo Berman	850.00*
Copeland, John	Return to Nashville CLC	500.00
Davidov, Marvin	Return to Uphoff, Minnesota Freedom Fund	1000.00 *
Densen, Alfonso	Return to same	500.00
Donald, Rev. Grady	Return to Nashville CLC	500.00
Feingold, Miriam	Return to SCLC	500.00
Leons, William	Return to same - repayment of UCLA loan	1000.00
McConnell, Paul	Return to same	400.00*
Minnesota Riders	Return to Joint Committee Equal Opportunity	160.00*
	David Aelony	500.00*
	M. H. Baker	100.00*
	Samuel I. Sigal	500.00*
Morton, David	See Minnesota Riders	
O'Connor, Claire	See Minnesota Riders	
Pavesic, Max	Repay to Same -- UCLA Loan	1000.00
Perkins, Philip	Repay to Maryland Area - Amer. Friends Service Committee	1000.00
Posner, Philip	Repay to same -- Loan from Temple Isaiah	1000.00
Sheviakov, Rick	Repay to same	1000.00
Singleton, Robert	Repay to same --UCLA loan	1000.00
Smith, Wollcott	Repay to same	1000.00
Uphoff, Eugene	Return to Walter Uphoff - Minn. F. R. Fund	900.00*
Wilson, Helene	IUD of the AFL-CIO (Return to:)	1000.00
Wolfson, Michael	Repay to same -- UCLA Loan	1000.00
Myers, Charles D.	Repay to same	1000.00* (20,060.00)

* On CORE records (Misc. Loan Acc't #3569)

In addition to the loans included in the above listing, Core also received loans for Freedom Rider Bond -- Rider unspecified in amounts from $25.00 to $4,000.00.

(approx.) 15,000.00

Some of the above may be negotiable.

Bond Returns to Legal Defense Fund, Inc.

(This listing does not include bond posted for the original $15,500.00 loan made to Carl Rachlin, Esq.)

James Bevel	$ 4000.00

$1,000.00 appeal bond for the following:

Marshall Bennett
Allen Levine
Norma Libson
Joseph McDonald
Lester McKinnie
Landy McNair
Eddora Manning
Robert Martinson
Robert Miller
David Morton
Grant Muse
Charles Myers
Sandra Nixon
Claire O'Conner
Ernest Patton, Jr.
Terry Perlman
Alphonso Petway
Lestra Peterson
Jean Pleume
Katherine Pleume
Elnora Price
Michael Prichard
Raymond Randolph
Carolyn Reed

John C. Roegers
Thomas Roland
Marcia Rosenbaum
Thomas Roland
Jane Rosett
Leon Russ
Henry Schwartzchild
Charles Sellers
Jorgia Seigal
Carol Silver
Obadiah Simms
Leon Smith
Harry Stoner
John Taylor
Wayne Taylor
Clarence Thomas
Willie Thomas
Jean Thompson
Shirley Thompson
Leotus Thornton
Claire Toombs
Earl Vance
William Wagoner
Tommy Walls

48,000.00

$52,000.00

Bond Return to SCLC

Henry Schwartzchild	500.00
Judy Ann Frieze	500.00
Leon Smith	500.00
	$1500.00

Personal (No Core Bond Involved)

Dr. Cecil A. Thomas	500.00	
Jean Kidwell		1,500.00
Rose Rosenberg		1,500.00
Allen Levine		500.00
		$4,000.00

Grand Total $196,060.00

cc

Thanks

[illegible]

FINAL REPORT
ON
FREEDOM RIDER CASES
HINDS COUNTY, MISSISSIPPI

Thomas Gaither
Field Secretary
C.O.R.E.

The following persons forfeited their appearance bond to the Hinds County, Mississippi Court.

Andrews, Harold
Audain, Mike
Brashean, Tommie E.
Brown, Elmer
Cason, Allen Jr.
Caston, Frank
Dalbert, Edmond Jr.
Greenblatt, Del
Kale, Edward
Lall, Candida
Levine, Eugene
Rogers, Janice
Sims, Pauline
Thorne, Richard

The following persons have appealed their cases but no trial date has been set;

Austin, Eddie
Baker, William
Brown, Luvaghn
Cox, Charles
Haley, Richard
Hamilton, Carl
Jones, Ashton
McLaurin, Charles
O'Neal, Hellen
Travis, Jimmie

The following persons have appealed from the County to the Circuit Court, Hinds County, Mississippi:

Ackerburg, Peter
Adler, Elizabeth
Aelony, Zev
Anderson, Alexander
Armstrong, Thomas
Baer, Byron
Bassford, Abraham
Baum, Robert
Bell, Larry
Bennett, Marshall
Bermen, Leora
Bevel, James--4 counts contributing to deliquency of juviniles
Bevel, James--"breach of the peace"
Blevins, George
Blue, Mildred
Bromberg, Edward
Clarke, Fred
Copeland, John
Davidov, Marvin
Davis, Jessie
Denson, Alfonso Jr.
Donald, Grady H.
Eisenberg, Marilyn
Farmer, James
Feingold, Miriam
Filner, Robert Earl
Floyd, Ralph
Freize, Judith

Appeals (cont'd.)

Fuller, Winston
Gerbac, Joseph
Givens, Samuel
Gordon, Albert
Green, Miller C.
Green, Robert
Griffith, Frankie
Grubbs, Michael
Hansen, William
Harbour, William
Harris, Jessie L.
Heller, Robert
Hirchfeld, Elizabeth
Horne, Erma Lee
Herrick, Jeanne
Jackson, Reginald
Kaufman, Alan Bruce
Knight, Pauline
Lee, Eugene
Leons, William
Levine, Allen
Libson, Norma
Lowry, John
Manning, Eddora
Matzkin, Norma
Martinson, Robert
Mitantonna, Rudolph
Morton, David K.
Moskowitz, Ruth
Muse, Grant H,, Jr.
Myers, Charles D.
McDonald, Joseph
McKinnie, Lester
McNair, Landy
McConnell, Paul D.
Nixon, Sandra
O'Conner, Claire
Palmer, Alpha
Patton, Ernest, Jr.
Pavesic, Max G.
Perkins, Phillip
Peterson, Lestra
Perlman, Terry S.
Pestana, Jean
Petway, Alphonso
Phillips, West D.
Pleune, Joan F.
Pleune, Katherine

Posner, Philip
Price, Elnora
Prichard, Michael
Randolph, Raymond
Reed, Carolyn
Richards, David
Rogers, John
Roland, Thomas V.
Rosenbaum, Marcia
Rosenberg, Rose Schorr
Rosett, Jane
Ross, Joseph L.
Rush, Heath C.
Russ, Leon De
Rosell, Henry
Schwartzschild, Henry
Sellers, Charles G., Jr.
Seigel, Jorgia B.Y.
Silver, Carol R.
Sims, Obadiah
Singleton, Helen
Singleton, Robert
Sheviakov, Rick
Smith, Leon S.
Smith, Woolcoot
Stewart, Richard
Stoner, Harry P.
Taylor, John C.
Taylor, Wayne L.
Thurman, Lonnie
Thomas, Cecil A.
Thomas, Clarence L., Jr.
Thomas, Willie J.
Thomas, Henry
Thompson, Jean C.
Thompson, Shirley
Thornton, Leotis
Townsend, Sam
Toombs, Claire
Uphoff, Eugene
Vance, Earl, Jr.
Wagoner, William
Watts, Joe, Jr.
Watts, Tommie
White, Lula M.
Wilson, Helene D.
Wolfson, Jack
Wright, Clearance M.
Wright, Leroy G.
Young, Paul
Zuchman, Louis

The following persons have entered the Nolo Contendre Plea since the Freedom Rider Trials started on August 22, 1961:

Ashford, Frank
Barber, Carroll G.
Baskerville, Patricia
Bass, Robert
Biggers, Charles
Booth, Charles
Bouknight, Gloria
Brashear, Tommie
Britt, Travis
Bryant, Patricia
Brooks, Catherine Burks
Burkholder, Daniel
Carmichael, Stokeley
Carter, Joseph
Carter, Rita
Chatham, Price
Collins, Lucretia
Brienes, Paul
Davis, James K., Jr.
Deitrich, Paul David
Dennis, David
Diamond, Dion Tyrone
Dolan, John
Dunn, Albert Lee
Fankhawser, David
Freelon, Mary
Gager, John, Jr.
Gaither, Glenda J.
Gettys, Francis
Goldbart, Lionel
Green, Paul S.
Green, Reginald M.
Green, Stephen
Greene, Gwendolyn
Greenstein, Stephen
Griswold, Richard
Gumbiner, Joseph
Garde, Donna
Hamilton, Mary
Harris, Gordon L.
Harris, Jessie J.
Heavey, Phillip Jay
Holloway, Frank G.
Horne, Andrew, Jr.
Horne, Leon D.
Hunt, Franklin
Hunter, Larry Fred
James, Dennis

Ihra, Margaret Lois
Ingraham, Lois Jean
Jenkins, Gwendolyn
Johnson, Edward
Johnson, Frank
Jorgenson, Mary L.
Jorgenson, Russell
Kay, Barbara
Kendall, Marion
Kerr, Margaret
Kytle, Karen
Lafayette, Bernard--1 "Breach of Peace"
3 Contributing to deliquency of juviniles
Lawson, James
Leonard, Fredrick
Leonard, Margaret
Lewis, John
Liggins, Claude
Linder, Morton G.
Mahoney, William Carl
Mitchell, William
Muntean, Fredrick D.
Nash, Samuel T.
Nelson, Frank
Owens, Robert
Peterson, Lestra
Petway, Kredelle
Petway, Matthew
Powell, Harry M.
Pratt, Joseph M.
Prensky, Catherine Jo
Rand, Roena
Raymond, George, Jr.
Reagon, Cordell H.
Reagon, Meryle Joy
Reynolds, Issac
Rice, Leon N.
Rowley, Salley J.
Scroggins, Judith
Simpson, Etta
Smith, Mary J.
Smith, Ruby D.
Smith, Shirley
Stevens, Daniel
Svanoe, Willard
Teale, Buron L.

Nolo (Cont'd.)

Triggs, Jan Leighton
Triss, Lawrence
Vivian, Cordy T.
Walker, Theresa E.
Walker, Wyatt T.
Washington, John R.
Washington, Leo V.
Warren, James
Weiss, Alexander
Wesby, Robert
Whalstrom, James--2 "Breach of Peace"
Williams, Douglas A.
Williams, Alan R.
Wilson, Francis L.
White, Melvin
Wells, Mack C.
Woods, Lowell A., Jr.
Word, Leslie
Wren, Tanya
Ziskind, Ellen Lee
Harrison, Mary

Persons acquitted in the Hinds County, Mississippi, Freedom Rider ~~Cases~~

Avery, Gilbert S., III
Bloy, Myron B., Jr.
Breeden, James P.
Carey, James T.
Cooper, Alan R.
Crocket, John
Evans, James M.
Jackson, Glenda Faye
Jenkins, Robert
Johnson, Percy Lee
Jones, Charles Andre
Jones, James Gerrard
Jones, James Wilson
Gordon, Quinland
Lane, Mark
Luster, Orville B.
Morris, John B.
Pierson, Robert Laughlin
Shilman, Kenneth
Simpson, Geoffrey
Singer, Felix J.
Slater, Morton Bruce
Sutton, Percy E.
Taylor, Robert P.
Thompson, Daniel Ray
Vance, O'Neal
Washington, Ralph
Wendt, William
Woodward, Vernon
Young, Merrill O.

The following persons paid fines to the Hinds County Court and the Jackson Municipal Court.

Gleason, Richard
Griffith, Joe H.
Moody, John
Sterling, Peter
Walker, Matthew, Jr.

The following persons served their entire sentences from the Jackson City Jail or from the Hinds County Jail:

Beamer, Winona Margaret
Brooks, Arthur, Jr.
Castle, Doris
Mann, Herbert
Smith, Jerome
Sullivan, Terry
Weber, Ernest
Wyckoff, Elizabeth

The following persons served their time and paid part of their fines:

Aaron, Julia
Greenberg, Joel
Huddleston, Roy A.
Manfield, Saul Bernie
McDonough, James
Rogers, Robert
Trumpower, Joan

Deceased

Barough, Albert

Juveniles released on Probation

Blue, LeVone
Haynes, Gaynell
Lynch, Delores
Mason, Robert
Watkins, Hezekias

TOTALS

Bond Forfeitures	14
Trials Pending	10
Appealed to Circuit Court	130
Nolo's	118
Acquittals	30
Paid Fines	5
Served Entire Sentences	8
Served Time, Part on Fines	7
Deceased	1
Juveniles Released on Probation	5
Total Dispositions	328

This report is not an official document of the Hinds County Court, but rather a record on Freedom Rider case dispositions as kept and prepared by:

Thomas Gaither
Field Secretary, C.O.R.E.

GALAMISON, MILTON, A. et.al. VS. BOARD of EDUCATION NEW YORK 1966-1967
(SCHOOL CASE)

Box 36
Folder 34

Historical Society Of Wisconsin

Please Retain Original Order

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

In the Matter of the Appeal of

MILTON A. GALAMISON, THELMA HAMILTON, HELE
CURTIS GRACE, ELIZABETH GRACE, MARGUERITE
ANGEL RIVERA, ZEDIA HARRINGTON, WILLA WEBS
VINCENT NEGRON, JOSEPH GRAYMON, WILLIAM MA
LENA MARLEY, ARNOLD GERBER, SONDRA GERBER,
BERNICE SHENHOUSE, JOHN KOLLOCK, WANSER BAL
FRANCES BROWN, FRED WILSON, LILLIAN WAGNER
BRITT, MARY BROWN, EDDIE MAE GREENE, JACQU
HOGAN, NATHANIEL MILLER, HENRY R. FULLER,
KIRKLAND, ROSE YOUNG, JAMES FISHER, HUME S
RUTH SEFF and KATE BALIS,

From the continuing action of the Board of
Education of the City of New York in refus
to institute an educational park in East
Brooklyn and instead continuing to constru
segregated and imbalanced schools resultin
the inclusion of such schools in the Capit
Budget for 1966-1967 as approved by the Ma
of the City of New York on April 20, 1966.

TO THE COMMISSIONER OF EDUCATION:

PLEASE TAKE NOTICE that the above name
hereby appeal to the Commissioner of Educa
continuing action of the Board of Educatio
New York in refusing to institute an educa
the East Brooklyn section of New York City
proposing the construction of designated s
be segregated and/or racially imbalanced w
action resulted in the Capital Budget for
City of New York approved by the Mayor on
providing for the construction of said des
that will be segregated or racially imbala

PLEASE TAKE FURTHER NOTICE, that petit
immediate hearing to determine whether a t
order should issue pending the determinati

petition and appeal, prohibiting the Board of Education of the City of New York from making final site selections or awarding architectural or construction contracts as to the following proposed schools:

P-301-K;
P-245-K;
P-347-K;
P-237-K;
I.S. 363-K;
I.S. 326-K and
I.S. 366-K

and,

PLEASE TAKE FURTHER NOTICE, that this appeal is taken upon the annexed petition, affidavits and exhibits.

Dated: New York, New York

April 29, 1966

Yours, etc.,

JOHN E. SILVERBERG
Attorney for Petitioners
Office & P. O. Address
15 Park Row
New York, New York 10038

TO: THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 Livingston Street
Brooklyn, New York

LEE J. RANKIN
Corporation Counsel of
The City of New York
Office & P. O. Address
Municipal Building
New York, New York 10007

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

---X

In the Matter of the Appeal of

MILTON A. GALAMISON, THELMA HAMILTON, HELEN EFTHIM, CURTIS GRACE, ELIZABETH GRACE, MARGUERITE GAITHER, ANGEL RIVERA, ZEDIA HARRINGTON, WILLA WEBSTER, VINCENT NEGRON, JOSEPH GRAYMON, WILLIAM MARLEY, LENA MARLEY, ARNOLD GERBER, SONDRA GERBER, BERNICE SHENHOUSE, JOHN KOLLOCK, WANSER BALTROP, FRANCES BROWN, FRED WILSON, LILLIAN WAGNER, LUISE BRITT, MARY BROWN, EDDIE MAE GREENE, JACQUELLINE HOGAN, NATHANIEL MILLER, HENRY R. FULLER, ARLENE KIRKLAND, ROSE YOUNG, JAMES FISHER, HUME SMITH, RUTH SEFF and KATE BALIS,

From the continuing action of the Board of Education of the City of New York in refusing to institute an educational park in East Brooklyn and instead continuing to construct segregated and imbalanced schools resulting in the inclusion of such schools in the Capital Budget for 1966-1967 as approved by the Mayor of the City of New York on April 20, 1966.

---X

TO THE HONORABLE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK:

The petition and appeal of, MILTON A. GALAMISON, THELMA HAMILTON, HELEN EFTHIM, CURTIS GRACE, ELIZABETH GRACE, MARGUERITE GAITHER, ANGEL RIVERA, ZEDIA HARRINGTON, WILLIA WEBSTER, VINCENT NEGRON, JOSEPH GRAYMON, WILLIAM MARLEY, LENA MARLEY, ARNOLD GERBER, SONDRA GERBER, BERNICE SHENHOUSE, JOHN KOLLOCK, WANSER BALTROP, FRANCES BROWN, FRED WILSON, LILLIAN WAGNER, LUISE BRITT, MARY BROWN, EDDIE MAE GREENE, JACQUELLINE HOGAN, NATHANIEL MILLER, HENRY R. FULLER, ARLENE KIRKLAND, ROSE YOUNG, JAMES FISHER, HUME SMITH, RUTH SEFF and KATE BALIS, of Kings County, New York, respectfully shows:

1. Petitioners, GALAMISON, HAMILTON and EFTHIM are tax payers and qualified voters in the City and State of New York, County of Kings. Petitioners, GALAMISON and

HAMILTON are Negro and petitioner, EFTHIM, is White. Petitioners, GALAMISON, HAMILTON and EFTHIM presently have no children in the public school system of the City of New York, however, each of these petitioners has for many years been involved in the effort to desegregate the public schools of the City of New York, correct the racial imbalance in said schools and bring educational excellence to said schools.

2. Petitioners, CURTIS, GRACE and ELIZABETH GRACE, are Negro and have three children in the public school system of the City of New York. The youngest, MICHAEL, is on open enrollment at P-244-K in East Flatbush. The other two children attend J. H. S. 285 also on open enrollment in East Flatbush.

Petitioner, MARGUERITTE GAITHER, is Negro and has five children attending P-165-K in the Brownsville area of Brooklyn, New York.

Petitioner, ANGEL RIVERA, is Puerto Rican and has one child attending P-175-K in the Brownsville section of Brooklyn, New York.

Petitioner, ZEDIA HARRINGTON, is Negro and has two children attending P-284-K and one child attending P-263-K all in the Brownsville area of Brooklyn, New York.

Petitioner, VINCENT NEGRON, is Puerto Rican and has one child attending P-156-K in the Brownsville area of Brooklyn, New York.

Petitioner, JOSEPH GRAYMON, is Negro and has one child attending J. H. S. 68-K on the over utilization plan in the Canarsie Section of Brooklyn, New York.

Petitioners, WILLIAM MARLEY and LENA MARLEY, are Negro and have one child attending P-189-K in the Brownsville area of Brooklyn, New York, one child attending J. H. S. 285-K in the East Flatbush area of Brooklyn, New York and one child attending J. H. S. 252-K in the East Flatbush section of Brooklyn, New York.

Petitioners, ARNOLD GERBER and SONDRA GERBER, are white and have onechild attending P-242-K in the Canarsie section of Brooklyn, New York.

Petitioner, BERNICE SHENHOUSE, is white and has two children attending P-242-K in the Canarsie section of Brooklyn, New York.

Petitioner, JOHN KOLLOCK, is Negro and has one child attending P-165-K in the Brownsville area of Brooklyn, New York.

Petitioner, WANZA BALTROP, is Negro and has one child attending P-235-K on open enrollment in the East Flatbush section of Brooklyn, New York.

Petitioner, FRANCES BROWN, is Negro and has one child attending J. H. S. 275-K in the Brownsville section of Brooklyn, New York.

Petitioner, FRED WILSON, is Puerto Rican and has two children attending P-135-K on open enrollment in the East Flatbush section of Brooklyn, New York.

Petitioner, LILLIAN WAGNER, is Negro and has one child attending P-175-K in the Brownsville section of Brooklyn, New York.

Petitioner, LUISE BRITT, is Negro and has three children attending P-202-K in the East New York section of Brooklyn, New York.

Petitioner, MARY BROWN, is Negro and has two children attending P-108-K in the East New York section of Brooklyn, New York.

Petitioner, EDDIE MAE GREENE, is Negro and has four children attending P-108-K and two children attending P-158-K all in the East New York section of Brooklyn, New York.

Petitioner, JACQUELLINE HOGAN, is Negro and has two children attending P-175-K in the Brownsville area of Brooklyn, New York.

Petitioner, NATHANIEL MILLER, is Negro and has one child attending P-150-K and two children attending P-298-K all in the Brownsville section of Brooklyn, New York.

Petitioner, HENRY R. FULLER, is Negro and has one child attending P-183-K in the Brownsville section of Brooklyn, New York.

Petitioner, ARLENE KIRKLAND, is Negro and has five children attending P-174-K in the East New York area of Brooklyn, New York.

Petitioner, ROSE YOUNG, is Negro and has two children attending P-174-K in the East New York section of Brooklyn, New York.

Petitioner, JAMES FISHER, is Negro and has three children attending P-108-K in the East New York section of Brooklyn, New York.

Petitioner, HUME SMITH, is Negro and has three children attending P-273-K in the East New York area of Brooklyn, New York.

Petitioner, RUTH SEFF, is White and has one child attending P-190-K in the East New York section of Brooklyn, New York.

Petitioner, KATE BALIS, is White and has one child attending P-182-K in the East New York section of Brooklyn, New York.

The above named petitioners bring this appeal for themselves, individually, and on behalf of their infant children attending the above designated schools. Those petitioners, members of the Negro race, bring this appeal individually and in behalf of all other members of the Negro race similarly situated. Those petitioners who are of Puerto Rican ancestry bring this action individually and in behalf of all other persons of Puerto Rican ancestry similarly situated. Those petitioners who are White bring this appeal individually and in behalf of all other white persons similarly situated. The petitioners and members of the classes for which this appeal is brought all have infant children aggregating tens of thousands who are of compulsory school age and required under the law of the State of New York to attend various public schools throughout the East Brooklyn section of the City of New York.

3. All of your petitioners reside in the Borough of Brooklyn, City and State of New York. Most of your petitioners reside in what is known as "East Brooklyn".

By way of explaining the kind of community in which we reside, we quote from a study done by the Board of Education which is cited and quoted at greater length in paragraph 8 of this petition:

> "At the present time, the Brownsville schools are attended almost entirely by children who are Negro or Puerto Rican; the East Flatbush and East New York areas are either largely White or in transition; and the Canarsie community is largely White."

The common designation for these four communities is "East Brooklyn" and the so-called Flatlands area is at the hub of the four communities located in East Brooklyn. In referring to a school map, Flatlands is located between J. H. S. 275-K and P-242-K.

4. ACTION APPEALED FROM:

Your petitioners, conceiving themselves aggrieved, appeal from the continuing action of the Board of Education of the City of New York, adopted in the Capital Budget for 1966-1967 on April 20, 1966 by the Mayor of the City of New York in, refusing to build an educational park in the Flatlands area of Brooklyn, New York and instead proposing that five Negro-Puerto Rican type* elementary schools be constructed in Brownsville; two Negro-Puerto Rican type intermediate schools be built in Brownsville; one intermediate predominently White school be constructed in East Flatbush; one intermediate predominently White school be built in Canarsie; one intermediate predominently White school be constructed in the Midwood, Flatlands, Sheepshead Bay area and one intermediate predominently White school be built in East New York.

The policy which is a continuing one of refusing to build an educational park and instead building "neighborhood schools" was evidenced September 23, 1966 by testimony of the Administrator of the School Planning and Research Division of the Board of Education before the Board of Estimate.

While the proposed construction of the Board of Education was considerably altered by the budgets of the Mayor and City Planning Commission, the Board's continuing action of refusal to build an integrated educational park in East Brooklyn and instead building segregated schools in Brownsville and racially imbalanced schools in adjacent areas was officially approved by the Mayor on April 20, 1966 in the Capital Budget for 1966-1967 copy of which appeared in the City Record on April 21, 1966 and is annexed hereto and made a part hereof. Said continuing action is the action from which the within appeal is taken.

---

* See the Allen Report, Page 2 "Defining Public School Segregation".

5. EVALUATING EFFECTS OF PAST EFFORTS OF THE BOARD OF EDUCATION TOWARD INTEGRATION:

On May 12, 1964, a report prepared by the State Education Commissioner's Advisory Committee on Human Relations and Community Tensions, hereinafter referred to as the Allen Report, was made. A copy of the Allen Report is annexed hereto and made a part hereof.

The Allen Report, on Page 8, asserts:

> "We must conclude that nothing undertaken by the New York City Board of Education since 1954, and nothing proposed since 1963, has contributed or will contribute in any meaningful degree to desegregating the public schools of the City. Each past effort, each current plan, and each projected proposal is either not aimed at reducing segregation or is developed in too limited a fashion to stimulate even slight progress toward desegregation".

Petitioners assert that the above conclusion is just as valid today as it was on May 12, 1964. The proof herein, however, will be restricted to the continuing Board action from which your petitioners are presently appealing.

6. "EVALUATION OF 1964-1970 SCHOOL BUILDING PROGRAM"

The heading of this paragraph of the petition was taken from Page 6 of the Allen Report as is the following quotation:

> "The school building program as presently set forth reinforces substantially the historic pattern of building on sites within the most segregated areas. This is the case chiefly in Negro residential areas, but it is also true in some mainly White neighborhoods, and thus helps to intensify both forms of segregation". (Underscoring appears as italics in the original text).

The 1966 School Building Program and Proposed Amendments to the 1965-1966 Capital Budget of the Board of

Education adopted September 29, 1965 fully supports the above statement from the Allen Report.

7. 1966-1967 SCHOOL BUILDING PROGRAM ADOPTED BY THE BOARD OF EDUCATION SEPTEMBER 29, 1965:

The adopted 1966-1967 School Building Program was prepared under the direction of BERNARD E. DONOVAN, Superintendent of Schools in the School Planning and Research Division of the Board of Education. Beginning on Page No. 1 of said "Building Program" copy of which is annexed hereto and made a part hereof, are several tables.

The following table has been constructed from the Board's tables.

No.	School Project	Approved site of proposed location or community to be served	App.	Prop. Cap.	Est. Const. Cost	Purpose of Project
15	P-245-K	Brownsville	C	1500	2.8	Primary school to service Brownsville Community
27	P-347-K	Brownsville	C	1500	2.8	Primary school to service Brownsville Community
51	P-237-K	Brownsville	a	1500	2.8	Primary school to service Brownsville Community
55	P-301-K	Brownsville	a	1500	2.8	Primary school to service Brownsville Community
92	IS-342-K	Brownsville	b	1800	4.7	Intermediate school for Brownsvill and adjacent communities
93	IS-343K	Brownsville	b	1800	4.7	Intermediate school for Brownsville and adjacent communities

No.	School Project.	Approved site or proposed location or community to be served.	App.	Prop. Cap.	Est. Const. Cost.	Purpose of Project
61	P-346-K.	(E.N.Y.) Louisiana Avenue - Collins Avenue	a	1200	2.4	Primary school facilities to serve new large-scale housing
53a.	IS-363-K.	Canarsie	c	1800	4.7	Changed from primary school to serve Canarsie-E. Flatbush and adjacent communities
31	IS-326-K.	Canarsie	c	1800	4.7	Intermediate School for Canarsie and adjacent communities
94	IS-361-K.	Midwood-Flatlands. Sheepshead Bay	b	1800	4.7	Intermediate school for Midwood-Flatlands-Sheepshead Bay and adjacent communities
83	IS-366-K	E. N. Y.	b	1800	4.7	Intermediate School for East New York and adjacent communities

Also annexed hereto as an exhibit is the ethnic and racial composition map of Brooklyn showing the ethnic and racial composition of the schools already in the porposed site locations and areas to be served. Upon information and belief, the same or similar map is annexed to the original of the Allen Report. An additional map defining the sections of Brooklyn is also annexed.

It appears that the sole effect of the Allen Report upon the 1966-1967 School Building Program in Brooklyn was to establish intermediate schools for Negro ghettos and all White areas with the notation that all may serve "adjacent communities" to avoid criticism from persons alleging that the multi-million dollar building program is designed merely to extend the racial segregation of public school children. Your petitioners allege herein that the history of this Board of Education as set forth in the Allen Report requires that the bare assertion "adjacent communities" be viewed with the gravest suspicion. The case histroy of J.H.S. 275-K in the area in question set forth in the supporting affidavits to this petition also raises the inference that "adjacent communities" is an empty, meaningless phrase. Even if the "good faith" of this Board were not in issue, and desegregation was planned for the new intermediate schools, the plan would be indefensible since there is an alternative plan, wholly realistic, known to the Board, which would provide for a far greater degree of desegregation in this badly segregated area. To deliberately choose to extend and perpetuate existing segregation where a feasible and realistic alternative exists is precisely government action for segregation and no longer falls within the meaning of de facto or accidental segregation.

8. "THE EDUCATIONAL PARK IN NEW YORK CITY"

In April, 1965, the Board of Education issued a study bearing the title which is quoted as the title for this paragraph of the within petition. A copy of "The Educational Park in New York City" is annexed hereto and made a part hereof. This study quotes the Allen Report on Page 1:

> " 'We recommend further that, as soon as possible, the middle schools should be located in educational parks so situated as to provide children in as many parts of the city as is feasible, the experience

of attending a genuinely integrated school during their middle school years. We recognize that for reasons previously pointed out, it may not be possible for some time to assure every child such an experience, but our objective is to bring it about for the greatest possible number. This we think can be accomplished by locating groups of middle schools on large sites designed to accomodate perhaps 15,000 children with administrative units organized so that each child will be a member of a school enrolling 500 to 1,000 pupils. The most practical location for such schools would be in areas where a suitable number of minority group children can be drawn from existing ghetto neighborhoods into parks which will also enroll children from White neighborhoods".

The Board's study goes on to say at page 5, et seq:

"The site which seems to meet best the criteria which have been established is located in Brooklyn, between E. 100th Street and E. 107th Street, and between Farragut Road and Avenue D (see Exhibit A). It is situated adjacent to four rather well-defined neighborhoods - Brownsville, Canarsie, East Flatbush and East New York. The reasons for the selection with reference to the established criteria are as follows:

"A. Integration

"The ethnic composition of the communities to be serviced and of the schools indicated a balanced school population within the educational park. At the present time, the Brownsville schools are attended almost entirely by children who are Negro or Puerto Rican; the East Flatbush and East New York areas are either largely White or in transition; and the Canarsie community is largely White.

"B. Educational and Sociological Soundness

"By the standards established in Section VII below, it seems clear that this site can be a very powerful aid in securing quality integrated education and in building a community.

"C. Land Availability

"This huge tract of approximately 90 acres is vacant city-owned land set aside for development as a new Brooklyn market. It may be possible to acquire a considerable portion of this land for public purposes.

"D. Flexibility
"The site is large enough and the available student population sufficiently varied as to provide opportunities for expansion or changes in organization.

"E. Economy
"The factors of available public land, concentration of pupils, ease of transportation and possibility of Urban Renewal funds increase the possibility for fiscal economy. Also, as indicated below, full use can be made of existing structures, and some of the capital building funds can be diverted from other planned schools which will no longer be needed.

"F. Stability
"There seems to be a likelihood of stability with reference to the numbers of pupils being served and their ethnic composition. For example, demographic projections based on social and economic factors seem to predict little change in the ethnic character of the Canarsie or the Brownsville areas. The East New York area most proximate to the site being considered seems likely to gain White pupils as a result of planned construction such as Fairfield Towers (1150 apartments), Meadowland Estates (5500 apartments) and Park Shore Village (5850 apartments). On the other hand, the East Flatbush areas will most probably gain minority group residents while losing White population, so that whatever ethnic balance is established will probably be maintained.

"G. Transportation
"The tract is located directly in the path of the BMT Canarsie line, only a few stops from the major junction of Broadway-Eastern Parkway. It is also served by a network of bus lines. (see Exhibit A). Children using the BMT in the morning would be traveling against the major flow of traffic. Travel by bus to and from the site is rather rapid.

"H. Proximity of Pupils
"There is a high concentration of pupils of middle school age in the communities being served. The six most proximate junior high schools have a present register of close to 10,000 in grades 7 to 9 and are within a mile and a quarter of the tract.

"It is not possible at this time to state with finality which geographic areas ought to be included within the school zone. Nevertheless, it is suggested that the following schools might well serve as a basis for discussion and evaluation since they meet the criteria for the creation of a viable educational park: J-68, 211, 252, 263, 275, 285. All six schools are approximately within a one-mile radius of the site (see Exhibit A). Population and ethnic data for the schools are as follows:

School	Enrollment	Negro	Puerto Rican	Others
J-68-K	1734	191	89	1454
J-211-K	1973	317	83	1573
J-252-K	1398	533	415	450
J-263-K	1599	924	642	33
J-275-K	1270	710	374	186
J-285-K	1589	176	52	1361
Totals	9563	2851	1655	5057
%	100	30	17	53

"The following building changes are suggested contingent upon the selection of the schools listed above:

"J-68-K to be converted to elementary school use to provide needed capacity.

"J-211-K to serve as an annext to Canarsie High School, which is only four short blocks distant. In view of the movement to a four year high school, this space will be badly needed.

"J-252-K to be converted to elementary school use to provide relief for over crowded Brownsville schools, and later on, East Flatbush schools.

"J-263-K to be converted to elementary school use to relieve over crowded Brownsville schools.

"J-275-K to be converted to elementary school use to relieve over crowded Brownsville schools.

"J-285-K to serve as an annex to Tilden High School, which is across the street.

"As indicated above, high school space is badly needed.

> "It will also be possible immediately to eliminate the following projects from the Building Program of the Board of Education:
>
> "P-245-K in vicinity of J-263-K ("a" money)
> "P-363-K in vicinity of J-68-K ("b) money)
> "P-361-K in vicinity of J-275-K (long range plans)
>
> "With existing building practices, it would require a miniumu of 12 acres to house these 9,500 pupils and an additional 6 acres for recreational space, at a total cost of approximately $27,000,000. The economics resulting from the availability of land, the sharing of facilities, more economical use of space, mass building practices, and the like should lower the cost considerably. Of course there will be some added expenses resulting from conversions of buildings, but hardly enough to offset the savings. It is also possible that funds may be available in the form of federal grants from the Urban Renewal Administration.
>
> "The use of 18 acres is based upon present building programs. However, an educational park, if it is to carry out its educational, recreational, and social purposes, will require much more land that this. These greater space requirements, while adding immeasurably to the significance of the educational park, would not under existing conditions add a great deal to the cost."

Petitioners believe that the above quoted study provided an excellent realistic and feasible alternative to a school program which "reinforces substantially the historic pattern of building on sites within the most segregated areas."

Not only has the Board continued its "historic pattern" but it has worked considerable financial sabotage to the subject of the above quoted study by informing the Board of Estimate that many years of experimentation with educational parks in areas not involving crucial problems of imbalance existing in East Brooklyn would be necessary before an educational park could be built in the Flatlands area. Accordingly, the Board of Estimate has leased the City owned property to a private concern in industrial development for thirty years. Unless that lease can be disturbed, the cost of land for a suitable Flatlands site would now be higher and additional time would be required for land clearance and tenant relocation.

9. BOARD OF ESTIMATE HEARING - SEPTEMBER 23, 1965:

On September 23, 1965, at a public hearing, the Board of Estimate was asked by LOUIS BROIDO, Commissioner of Commerce and Industrial Development to designate the Flatlands site for industrial development, with the understanding that a thirty year lease to the New York City Industrial Development Corporation would be executed by the City.* Many tax payers opposed this designation on the grounds that the site was needed for the Board of Education's educational park. ADRIAN BLUMENFELD, Administrator of the School Planning and Research Division of the Board of Education, which on September 29, 1965 adopted the 1966-1967 School Building Program as aforementioned, testified on behalf of the Board of Education. Included in his testimony was reference to a press release dated September 23, 1965 in behalf of the Board of Education by its President, LLOYD K. GARRISON, which said among other things:

"We have determined that the concept of

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* (Subsequent to approval by the Board of Estimate, a lease was executed and then a sub-lease to the Rentar Development Corporation whose business address is shared with Rentar Truck Renting Corp. in Queens County for the actual development of the property.)

> an educational park is worthy of experimentation. We are therefore, instructing the Superintendent of Schools to take the necessary steps to see that an educational park is established in two locations, namely Co-op City in the Bronx and the Kingsbridge location (Bronx-Manhattan border) of the proposed John F. Kennedy High School."
>
> and
>
> "If the experiment with the educational park is successful, the concept will be expanded to other areas of the city. Among these would be the East New York-Brownsville-Canarsie area. We are requesting the Board of Estimate, in its consideration of the industrial park for this area, to be aware of the fact that it is a logical area for the extension of the educational park concept. In any action they may take on the proposed industrial park, we are requesting that they include consideration of a section of that area or a suitable area immediately adjacent to it for retention as a possible educational park."

Annexed hereto and made a part hereof is the full testimony of Mr. Blumenfeld.

The emergency of having "the site which seems to meet best the criteria established" designated and leased for industrial development was met by informing the Board of Estimate that some adjacent land should be set aside for possible use many years hence. The corrollary to this testimony of the Board of Education "as it proceeds toward quality integrated education"* was the inclusion of proposed construction that will extend and expand segregation and racial imbalance in East Brooklyn in the Capital Budget for 1966-1967 as approved by the Mayor of the City of New York on April 20, 1966.

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* (1966-1967 School Building Program adopted 9/29/65 forward Page 2, 9/30/65.)

Some of the more obvious attempts to subvert the Allen Report and build for segregation were disapproved by the City Planning Commission and Mayor John V. Lindsay.

The Board's subversion of its alleged integration program on September 23, 1965 was not entirely overlooked by the new Mayor or the City Planning Commission. They, however, were powerless to do more than delete construction items that were obviously in conflict with the Allen Report.

10. THE 1966-1967 DRAFT CAPITAL BUDGET OF THE CITY PLANNING COMMISSION; REPORT AND DELETIONS JANUARY 3, 1966:

Page ii of the Draft Capital Budget of the City Planning Commission dated January 3, 1966 includes the following concerning the East Brooklyn educational park:

> "Educational Park in Eastern Brooklyn - As at previous hearings, many speakers appeared to urge development of an educational park complex to relieve overcrowding in the Brownsville-East New York-Canarsie area and to provide quality, integrated education.
>
> "While the actual decision to go ahead with such a plan in this area rests with the Board of Education, the Planning Commission is satisfied that this is an excellent area to test the educational park concept. The Commission does not believe that the development of the Flatlands Industrial Park, which we recognize as an important asset, forecloses the realization of an educational park to serve this section of the City. There are several site possibilities in this general area for the educational park. The Commission believes both the industrial park and the educational complex can be valuable additions to this community.
>
> "We urge that the Board give careful, positive consideration to the educational park proposal for this area before taking final actions on the sites of the proposed schools to serve this area."

Copy of the City Record of January 3, 1966 is annexed hereto and made a part hereof.

Owing to the Board's indecisiveness on integration questions, the City Planning Commission refused to approve the requested budget:

> "Certain matters still remain to be decided, however: whether the intermediate school shall contain three or four years; the way in which the new comprehensive high schools shall be designed; and the exact location of intermediate schools in terms of integration. It is inevitable (and in some instances, desirable) that pending clarification of these policies there would be delays in the school building program. And so, while the $130 million proposed to considerably less than the sum requested by the Board of Education, the special circumstances surrounding the Board's building program would seem to indicate that this sum is as much as should reasonably be set aside for the 1966-1967 period."

Page V 1966-1967 Draft Capital Budget, Spra.

Sensing total lack of sincerity by the Board of Education, the City Planning Commission deleted I.S. 342-K and I.S. 343-K designated as Brownsville and adjacent areas, intermediate schools by the Board (see table supra) from its Draft Capital Budget and made the following comment (p. v Supra):

> "3. Canarsie area - The Draft Budget contains two new intermediate schools for the Canarsie area - one for construction and one for "a" category (site and planning). These projects are being advanced on the basis of information from the Board of Education that they are not ready to proceed with an educational park in this areas at this time. Two other such developments are being planned in other parts of the City and the Board wishes to evaluate these before proceeding further."

By deleting the two Brownsville intermediate schools and advancing two intermediate schools in Canarsie, the City Planning Commission is giving the Board of Education an opportunity to integrate the two schools in Canarsie. There is no evidence that the Board intends to integrate those schools (I.S. 363-K and I.S. 326-K Page 3 Draft Capital Budget Supra) and if the Board were to decide on such a course, the desegregation achieved would fall far short of what could be accomplished by building an educational park now. Future planning would require additional intermediate schools. Must Negro and Puerto Rican children forever travel to White areas to achieve some degree of integration? How much more sensible to have all ethnic groups travel to the neutral educational park.

The City Planning Commission on January 3, 1966 also deleted P-346-K in a largely White areas of East New York that was to serve new large scale house, I.S. 361-K in the Midwood-Flatlands-Sheepshead Bay area, largely White that was to have served those and "adjacent communities" and I.S. 366-K in an areas in which new middle class large scale housing is to be built in East New York. Of these only I.S. 366-K was finally restored by the Capital Budget for 1966-1967 as finalized April 20, 1966.

The City Planning Commission failed to disturb any of the primary schools planned for the Brownsville section since, although they will surely be segregated, Negro, Puerto Rican type schools, they apparently do not violate the standards set forth in the Allen Report.

Copies of the report and budget of the City Planning Commission are found in the City Record of 1/3/66 annexed hereto.

11. MESSAGE OF THE MAYOR FEBRUARY 1, 1966 AND DELETION FROM THE EXECUTIVE CAPITAL BUDGET FOR 1966-1967:

The message of the Mayor to the Board of Estimate and City Council on February 1, 1966 was sharply critical of the Board of Education's failure to take an optimistic view of educational parks and suggested that the Mayor might succeed in having an educational park established for East Brooklyn before the Board of Education can begin construction of school buildings in a program which "reinforces substantially the historic pattern of building on sites within the most segregated areas". The said message and budget are found in the City Record, February 1, 1966, copy of which is annexed hereto and made a part hereof.

Part of the said message reads as follows:

> "I am satisfied that an educational campus composed of schools ranging from the intermediate level through the senior colleges offers exciting possibilities for improving the education that we offer our children. The Board of Education has demonstrated in its capital requests that it takes a much less optimistic view of this concept. Moreover, I know of no studies yet made which answer the many very real questions surrounding the establishment of such a campus. To list only a few of these questions: What facilities can be fruitfully shared; what building design and program coordination will be best for the large numbers of children in a concentrated area; what classroom groupsings would take maximum advantage of the strengths of diversity on such a campus while taking into account the very different preparation of the participating children; how can the problems of pupil movement be solved; what facilities

> financed by Title III of the Federal Aid to Education and Secondary Education Act could be used by different schools within a complex; how might private and parochial schools relate to a campus; what other community facilities can be incorporated? I believe the answers to these and other questions will demonstrate that the campus is a useful innovation.
>
> "The Flatlands Industrial Park Site in the Canarsie-Brownsville-East New York section of Brooklyn has been urged as the site of an educational campus, and the City Planning Commission in its draft budget message expressed the hope that the Board of Education would give positive consideration to this proposal before taking final action on the sites of new schools in that area. Unfortunately, no adequate preparation has been made for the use of that site as a campus. A workable program for using it as an industrial park has been developed.
>
> "I am informed that the Board of Education is making application to the Federal Government for monies to plan the educational services to be rendered in an educational park. A rapid, full scale inquiry which can be implemented forthwith is essential to answer the whole spectrum of questions in this area. I fully support a study financed with Federal money utilizing the best talent in the country.
>
> "Notwithstanding any study, however, the formulation of the City's capital budget must proceed, and we cannot delay the processing of needed school facilities. I have, therefore, included in the executive budget a number of schools even though they may be affected before construction is begun if I am successful in having an educational campus established." (The City Record -- February 1, 1966 -- Message of the Mayor, p. ii)

The Mayor's Capital Budget also deleted all the projects in East Brooklyn previously deleted by the City Planning Commission although the final Capital Budget for

1966-1967 restored I.S. 366-K.

It is apparent that your petitioners are not alone in believing that a workable alternative exists to the continued construction of schools that will be segregated or racially imbalanced. The Board of Education had the responsibility of implementing that alternative. Having failed in that responsibility, your petitioners now appeal from the Board's failure. However, we also appeal from errors of commission as well as those of omission. We seek no order that once again places the Board of Education in a position to sabotage the clearly stated policies of the Board of Regents as applied to New York City in the Allen Report. Other recalcitrant school boards have demonstrated that there is no magic in the locality of "New York" that lifts its school boards beyond the suspicion of a firm though camoflaged intent to subvert the policies of the Board of Regents with reference to eliminating racial imbalance as speedily as circumstances permit.

12. SCHOOL CONSTRUCTION CRISIS:

The New York City Board of Education did not believe that the Board of Regents policy on imbalance was intended to be applied literally. Accordingly, the Allen Report was made to deal specifically with New York City.* The Allen Report gave its full approval of the neighborhood school concept only through the fourth grade. The Allen Report does not tolerate segregation beyond the fourth grade.

The Board of Education accordingly finds no difficulty in planning elementary schools for segregated

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* See annexed copy of exchange of letters between CALVIN E. GROSS and COMMISSIONER JAMES A. ALLEN.

Brownsville. The Board of Education attempted to build two Negro-Puerto Rican type intermediate schools for segregated Brownsville, but was stopped by the Mayor and the City Planning Commission. This left the Board without plans for the construction of schools for Negros and Puerto-Ricans beyond grade four. This is precisely the indecisive posture of the Board today. Desegregation of the children of Brownsville beyond grade four requires either:

(a) The educational park, or
(b) Bringing White children into Brownsville, or
(c) Taking all the Negro and Puerto Rican children out of Brownsville into the existing White schools

Of these alternatives, (b) and (c) are neither realistic or politically feasible at the present time.

The Mayor and City Planning Commission did not believe that the Board was planning to bring White children into Brownsville intermediate schools and disallowed the schools. Even if sufficient seats are available to take all Brownsville children into existing predominantly White schools and two new predominantly White intermediate schools, neither the White nor Negro communities would tolerate such a move. White opposition to an educational park in this area would be considerable, but this forecast of opposition may not be permitted to deter proper implementation of the Allen Report. Nor may a forecast of White opposition be tolerated as an excuse for failure to build schools for Negro and Puerto Rican children beyond grade four. This Board must be ordered to build schools that will provide a desegregated equal education for all children.

WHEREFORE, petitioners respectfully urge that an immediate investigation and hearing be instituted; that pending the termination of this appeal, the Board of Education be restrained from making final site selections or awarding architectural or construction contracts as to the following proposed schools:

P-245-K
P-347-K
P-237-K
P-301-K
I.S. 363-K
I.S. 326-K
I.S. 366-K

that final order be issued in accordance with the findings of a special investigation requiring the Board of Education to take the specific steps found necessary by the State Commissioner of Education to desegregate and racially balance the proposed and existing schools in East Brooklyn to the extent realistic and feasible in view of existing patterns of residential segregation; that to achieve that result the funds now designated for proposed neighborhood schools must be channeled to the proposed schools of an educational park.

Respectfully submitted
this day of May, 1966

William Marley
Lena Marley
Arnold Gerber
Sondra Gerber
Bernice Shenhouse
John Kollock
Wanser Baltrop
Frances Brown
Fred Wilson
Lillian Wagner
Luise Britt
Eddie Mae Greene
Nathaniel Miller
Arlene Kirkland
James Fisher
Ruth Seff

Thelma Hamilton
Helen Efthim
Curtis Grace
Elizabeth Grace
Marguerite Gaither
Angel Rivera
Zedia Harrington
Willa Webster
Vincent Negron
Joseph Graymon
Mary Brown
Jacquelline Hogan
Henry R. Fuller
Rose Young
Hume Smith
Kate Balis

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

MILTON A. GALAMISON, THELMA HAMILTON, HELEN EFTHIM, CURTIS GRACE, ELIZABETH GRACE, MARGUERITE GAITHER, ANGEL RIVERA, ZEDIA HARRINGTON, WILLA WEBSTER, VINCENT NEGRON, JOSEPH GRAYMON, WILLIAM MARLEY, LENA MARLEY, ARNOLD GERBER, SONDRA GERBER, BERNICE SHENHOUSE, JOHN KOLLOCK, WANSER BALTROP, FRANCES BROWN, FRED WILSON, LILLIAN WAGERN, MARY BROWN, EDDIE MAE GREENE, JACQUELLINE HOGAN, NATHANIEL MILLER, HENRY R. FULLER, ARLENE KIRKLAND, ROSE YOUNG, JAMES FISHER, HUME SMITH, RUTH SEFF and KATE BALIS, being duly sworn, say that they are the petitioners named in the foregoing Notice of Motion and Petition; that they have read the same and know the contents thereof and that the same is true except as to the matters therein alleged upon information and belief and as to those matters they believe it to be true.

Sworn to before me this
11 day of May, 1966.

John E. Silverberg

Thelma Hamilton
Helen Efthim
Curtis Grace
Elizabeth Grace
Willa Webster
Marguerite Gaither
Angel Rivera
Zedia Harrington
Vincent Negron
Joseph Graymon
William Marley
Lena Marley
Arnold Gerber
Sondra Gerber
Bernice Shenhouse
John Kollock
Wanser Baltrop
Frances Brown
Fred Wilson
Lillian Wagner
Mary Brown
Eddie Mae Greene
Jacquelline Hogan
Nathaniel Miller
Henry R. Fuller
Arlene Kirkland
Rose Young
James Fisher
Hume Smith
Ruth Seff
Kate Balis

re- grant of stay order restraining Bd of Ed. from proceeding with final site selection and awarding of contracts for seven school projects

№

The University of the State of New York
The State Department of Education
Before the Commissioner

IN THE MATTER

of the

Appeal of MILTON A. GALAMISON, THELMA
HAMILTON, HELEN EFTHIM, CURTIS GRACE,
et al., from the continuing action of the
Board of Education of the City of New
York in refusing to institute an education
park in East Brooklyn.

John E. Silverberg, Esq............Attorney for Appellants

Hon. J. Lee Rankin.................Attorney for Respondent
Corporation Counsel
John J. Loflin, Esq., of Counsel

An appeal having been instituted by the above-entitled appellants from the refusal of the Board of Education of the City School District of the City of New York to plan and provide for an educational park in East Brooklyn and a Stay Order having been requested restraining the said Board of Education from proceeding with final site selection and aquisition and from awarding architectural and construction contracts for seven certain school projects; oral argument having been had on the matter and sufficient cause appearing therefor,

NOW, THEREFORE, under and pursuant to the powers vested in me by the Education Law and particularly Section 311 thereof, IT IS ORDERED, That the Board of Education of the City School District of the City of New York be, and the same hereby is, stayed from final site selection and site aquisition and from awarding architectural and construction contracts, or any of these, in relation to the following proposed schools, all of which are located in the borough of Brooklyn and specifically in that area thereof known as East Brooklyn:

P-245-K
P-347-K
P-237-K
P-301-K
I.S. 363-K
I.S. 326-K
I.S. 366-K

pending the hearing and determination of the appeal herein.

IN WITNESS WHEREOF, I, James E. Allen, Jr. Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 24th day of June, 1966.

James E Allen Jr
Commissioner of Education

Galamison
1966

DRAFT

STATE OF NEW YORK
DEPARTMENT OF EDUCATION
-----------------------------------X

In the Matter of the Appeal

of

Milton A. Galamison et al.,

-----------------------------------X

Interest of Amici Curiae

(To be inserted)

Statement

This proceeding is brought before the Commissioner pursuant to Section 310 of the Education Law. The facts are fully detailed in the Petition and will be only briefly summarized here.

The petitioners, of whom some are White, some Negro and some Puerto Rican, brought this action on their own and on their children's behalf, as well as on behalf of all members of their respective groups, White, Negro and Puerto Rican, similarly situated. They seek redress from the decisions and actions of the New York City Board of Education (hereinafter called the "Board") which rejected plans for an integrated educational park for the East Brooklyn area and adopted instead a plan that not only does not provide for integration of existing facilities but provides for building a number of new schools ~~many~~ Most of which — ~~at~~ Negro — white only — would have ~~[illegible]~~ would be segregated. The Commissioner has issued an order staying further steps toward the construction of seven proposed schools in the East Brooklyn area pending the outcome of this proceeding. We ~~suggest~~ urge that such proposal, in so far as it knowingly creates more segregated schools violates the ~~[illegible]~~ program of the Commissioner as well as the Constitution of the U.S. and the State of N.Y.

All petitioners are residents of the Borough of Brooklyn in the City and State of New York. Most of them reside in and have children who attend public schools in the East Brooklyn area. That area is made up of four ~~communities~~ areas; Brownsville, East Flatbush, East New York and Canarsie. A study issued by the

New York City Board of Education in April 1965 entitled "The Educational Park in New York" (a copy of which is annexed to petitioners' papers as exhibit) concludes that the Flatlands area at the hub between the four East Brooklyn communities is an excellent site for an educational park which would provide quality integrated education. The same conclusion was reached by the City Planning Commission (see p. ii of the Draft Capital Budget of the City Planning Commission, dated January 3, 1966--contained in the CITY RECORD, a copy of which is annexed to the petition as exhibit).

The Board has explicitly recognized the need for action in this area. In its April 1965 ? ([illegible]) report, it said:

> At the present time, the Brownsville schools are attended almost entirely by children who are Negro or Puerto Rican; the East Flatbush and East New York areas are either largely white or in transition; and the Canarsie community is largely white.

Nevertheless, after first supporting the Flatlands site for an integrated educational park, it has now rejected it. ~~without proposing any substitute that would advance integration.~~ Instead it proposes a plan which would ~~for~~ cause construction of — segregated schools. It has not budgeted any funds or made public any plans to integrate any of the schools now existing in the East Brooklyn area.

In order to obtain quality integrated education for their children, petitioners ask that the Board be restrained from taking any further action with regard to construction or preparation for construction of schools in the East Brooklyn area until the Board has incorporated in its East Brooklyn school construction program such specific steps to desegregate and racially balance proposed and existing schools as are formulated by the Commissioner after an investigation of the facts.

In their petition Petitioners assert that an educational park costing less than the 105 million dollars the Board now plans to spend in the area would not only solve nearly all the integration problems for the entire area but would result in a major improvement in the quality of education. ~~The undersigned amici~~ While the amici

generally
~~generally~~ support this position,
~~We do not~~, at this time, take any

~~curiae support that position.~~ We ~~wish to stress the point that more than one~~
position as to ~~site~~ or the most appropriate site.
~~alternative may be available.~~ Given the Board's failure to even plan much less carry out any meaningful affirmative action to integrate the East Brooklyn schools in the 12 years since the United States Supreme Court condemned racial segregation
and given the fact that ~~it~~ this plan knowingly perpetuates segregation,
in education in Brown v. Board of Education (347 U. S. 483 (1954), the time has come for action by an impartial expert designed to formulate specific steps to achieve integration. The question to be determined at this stage is not
or if it is, the site and kind of such ed-park.
merely whether an educational park is the best answer. Given ten years of inaction by the Board, leading to issuance by the Commissioner of a comprehensive report (familiarly known as the "Allen Report"),*/ given two years of inaction by the Board since that Report, during which its recommendations have been ignored, and given Board promulgation of a 105-million-dollar plan that will not integrate existing facilities but will create new segregated facilities and will permanently fix schooling in East Brooklyn in a segregated pattern -- given these factors, the question is whether the petitioners and the classes they
as well as numerous people in New York City
represent are entitled to action by this Commissioner insuring formulation and implementation of an integration plan for their community. At this time it
Can hardly be doubted that a necessary ingredient of quality education is integration of students.

In the following pages, we urge (1) that the Commissioner has made it clear that it is the policy of this state that all public school authorities have an obligation to take affirmative action to prevent racial segregation; (2) that the New York City Board of Education has failed to fulfill that obligation, generally and in East Brooklyn specifically; and (3) that construction of an educational park in East Brooklyn is at least one feasible alternative.

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* "Desegregating the Public Schools of New York City" by The State Education Commissioner's Advisory Committee on Human Relations and Community Tensions (May 12, 1964).

ARGUMENT

I. IT IS THE POLICY OF THE STATE OF NEW YORK TO REQUIRE EACH BOARD OF EDUCATION TO TAKE ALL REASONABLE AFFIRMATIVE ACTION NECESSARY TO PROVIDE FOR CONSTRUCTION OF INTEGRATED SCHOOL FACILITIES AND DESEGREGATION OF EXISTING FACILITIES.

The Supreme Court's decision of 1954 in the Brown case, supra, stimulated intensive reevaluation of the phenomenon of racial segregation in our public schools -- north as well as south, de facto as well as de jure. Particularly in the north, the effects of segregation were reviewed by educational authorities and a number were led to conclude that it is educationally harmful whether or not it has the sanction of law. In this state, the Department of Education, exercising its responsibility of supervision of local educational policy, concluded that ~~so-called~~ ~~de facto~~ school segregation was an evil that must be brought under control, regardless of whether ~~delibe~~ planned ~~or whether~~ ~~the result of~~ as in the Board's program, or whether the result of changing racial composition of an area

Thus, in January 1960, the Board of Regents issued a Statement of Policy which included the following:

> The State of New York has long held the principle that equal opportunity for all children, without regard to differences in economic, national, religious or racial background is a manifestation of the vitality of our American democratic society and is essential to its continuation. This fundamental educational principle has long since been written into Education Law and policy. Subsequent events have repeatedly given it moral reaffirmation. Nevertheless, all citizens have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.

In a memorandum to all chief local school administrators and presidents of boards of education dated June 14, 1965, the State Commissioner of Education stated the policy of New York State with regard to ~~de facto~~ racially imbalanced segregation as follows:

> The position of the Department, based on the policy of the Regents, and the principles of the Commissioner's Advisory Committee, is that the racial imbalance existing in a school in which the enrollment is wholly or predominatnly Negro interferes with the achievement of equality of educational opportunity and must therefore be eliminated from the schools of New York State.

If this is to be accomplished, there must be corrective action in each community where such imbalance exists. In keeping with the principle of local control, it is the responsibility of the local school authorities in such communities to develop and implement the necessary plans.

It is recognized that in some communities residential patterns and other factors may present serious obstacles to the attainment of racially balanced schools. This does not, however, relieve the school authorities of their responsibility for doing everything within their power, consistent with the principles of sound education, to achieve an equitable balance.

The State requirement that all affirmative action be taken to racially balance schools consistent with the maintenance of the quality of education was underscored by the request in the memorandum that before the beginning of the next school term recipients of the memorandum forward to the Commissioner the following:

1. A statement indicating the situation in your district with with regard to any problem of racial imbalance, regardless of the number of Negro children enrolled, or to the actual existence of or trend toward racial balance. At this time and for the purpose of this report, a racially imbalanced school is defined as one having 50 per cent or more Negro pupils enrolled.

2. A statement of policy by your board of education with respect to the maintenance of racial balance in your schools.

3. In districts where racial imbalance exists, or is a problem, a report of progress made toward eliminating it.

4. In such districts, your plan for further action, including estimates of the additional cost, if any, and of the time required for carrying out your plan.

This policy finds firm support in the decision of the United States Supreme Court dealing with school segregation. Thus, in ~~the~~ Brown ~~case~~, the Court held that, ~~even~~ should tangible factors ~~were~~ be provided in equal amounts, racially segregated public schools provide education which is inherently unequal. It said (347 U. S. at 495):

> Separate educational facilities are inherently unequal. Therefore we hold that the petitioners and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment..

In Cooper v. Aaron, 358 U. S. 1, 7 (1958), the Court restated the Brown holding and said that the Constitution required state authorities in Arkansas to

> ... devote every effort toward initiating desegregation and bringing about the eliminating of racial discrimination in the public school system.

While the Supreme Court has not specifically ruled on the application of its earlier rulings to so-called de facto segregation, there is impressive authority in lower court decisions for the proposition that the holdings in the Brown and Aaron cases mean that the State's policy is not only sanctioned by but required by the Constitution. Thus, the Federal District Court for the Eastern District of New York has said:

> The central constitutional fact is the inadequacy of segregated education. That it is not coerced by direct action of an arm of the state cannot, alone, be decisive of the issue of deprivation of constitutional right. Education is compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted.
>
> Failure to deal with a condition as really inflicts as does any grosser imposition of it. (Branche v. Board of Education, 204 F. Supp. 150 (E. D., N. Y. 1962).

Similarly, the Supreme Court for the State of California sitting en banc held:

> ... even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school.... Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards, take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause. (Jackson v. Pasadena School District, 31 Cal. Rep. 606, 382 P. 2d 878 (1963).

nor is Bell v Gary ~~any~~ — any authority denying the right of the Commissioner or the Board as part of its educational policy to create racially balanced schools. Both the high courts of New York and New Jersey support this view. At most Bell v Gary, says that where the Board fails to act in a situation it did not create, The Court cannot force such action.

New York State's requirement that its school officials take whatever reasonable steps are available to achieve racial balance is a policy requiring *action* by local school officials, not merely policy statements indicating agreement in theory with racial balancing. The Commissioner made this clear in *Mitchell v. Malverne* (2 Educational Reports 501 (1963)), when he formulated specific steps to balance the Malverne schools which the local board was required to institute. We submit that the time has come for similar action in New York City.

II. THE NEW YORK CITY BOARD HAS FAILED TO TAKE AFFIRMATIVE ACTION ON EITHER A CITY-WIDE LEVEL OR IN EAST BROOKLYN.

On December 23, 1954, in response to the *Brown* decision, the New York City Board of Education stated that its policy was to take affirmative action to eliminate segregation in the schools. It appointed a Commission on Integration and stated in any accompanying document, entitled "Preliminary Statement of Board of Education Resolution for Action":

> It is imperative that members of this Commission approach their responsibility with the understanding that *racially homogeneous public schools are educationally undesirable.* It is now the clearly reiterated policy and program of the Board of Education of the City of New York to devise and put into operation a plan which will prevent the further development of such schools and would integrate the existing ones as quickly as practicable. (Emphasis supplied.)

At that time there were nine segregated junior high schools and 43 segregated elementary schools -- a total of 8% of all schools. "The Status of Negro and Puerto Rican children in the New York City Public Schools," Public Education Association Study (1955).

In 1963, in a pamphlet entitled "Policy on Integration" which includes the subtitle, "A Re-affirmation of the Policy Originally Adopted in 1954," the Board stated:

> Our school system must vigorously employ every means at our disposal to desegregate schools and classrooms and to bring about true integration as soon as possible.

At that time, there were 31 segregated junior high schools and 134 segregated primary schools -- a total of 23% of all schools. (Citation) Thus, in the nine years following the Brown decision, instead of decreasing, the percentage of segregated elementary ~~schools nearly tripled. The number of segregated junior~~ and junior high schools more than tripled. Furthermore, from 1960 to 1965, while the number of Puerto Rican and Negro children in the elementary schools increased 36%, there was a 104% increase in the percentage of segregated elementary schools. (Citation) The Board's failure to take meaningful action in this field is reflected in the conclusions of the Allen Report, among which are the following (pp. 27-28, emphasis in original):

> 3. The Board of Education has made efforts between 1954 and the present which were intended to reduce segregation. These efforts have had no measurable effect upon the overall number of students attending segregated schools or upon the number of segregated schools in the system.
>
> 4. Early in 1964, the Board of Education introduced new proposals intended to aid in desegregating the public schools. The new proposals considered singly and in combination, would not reduce current levels of school segregation or prevent future increases.
>
> 5. Ethnic segregation cannot be wholly eliminated from the schools of New York City in the foreseeable future, but the adoption of wise and intelligent policies can reduce segregation substantially. The basic requirement is a deep and sustained commitment on the part of the Board and its staff to the purpose of reducing segregation throughout the city at the earliest time and at the fastest possible rate.
>
> 6. The adopted building program of the Board does not treat desegregation as a main factor in choosing sites, although this factor could be utilized.

The patterns of segregated residential neighborhoods which exist throughout New York City, coupled with the increase in the proportion of New York

City's population comprised of Negroes and Puerto Ricans, undoubtedly makes the task of integrating the city's schools ~~very~~ difficult. ~~The~~ But such difficulties ~~inherent in the situation~~ were recognized in the Allen Report. ~~But the Allen Report~~ that report concluded that important steps could be taken which would reduce the number of schools already segregated and stop the trend of increasing segregation. ~~The Board's record of action~~ While lip service is given to such report, ~~as distinguished from words,~~ ~~shows~~ no acceptance of ~~that~~ its conclusion shows in the Board's course of conduct

What is most disturbing about the Board's statements and actions is an underlying quality of defeatism. It is not insignificant that whenever the Board refers to integrated neighborhoods they are classified as either fringe areas or transition areas. Apparently, the Board does not think in terms of integrated neighborhoods. It sees integrated areas as being on the boundary between white and minority ghettos or in the transitional stage of becoming ghettos. The plan it proposes, in fact, encourages flight from one area to another and may cause "fringe" areas to become all Negro or Puerto Rican

Moreover, the Board fails to recognize the powerful effect schools can have in determining whether a neighborhood is to be stabilized on an integrated basis or is to be disrupted by panic and flight. Obviously, the placing of a ~~new, well-planned school~~ new school of broad scope in a "transition" area ~~can~~ may play a major role in ~~converting it~~ stabilizing an area into a settled integrated neighborhood.*

The Board's failure to recognize this -- ~~and its tendency to see the problem solely in terms of integrating the schools --~~ is revealed in the affidavit of June 20, 1966, filed in this proceeding by Jacob Landers, the Board's Assistant Superintendent in Charge of Integration Programs, where he said (at p. 5):

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[*] In a recent study by the National Opinion Research Center, "Social Psychological Factors in Intergroup Housing -- Results of Pilot Test," by Seymour Sudman and Norman Bradburn (May, 1966), it was found that (p. 10): "Among community facilities which attract and keep residents, schools are considered the most important, then churches, then recreational facilities, and then community organizations." One of the persons interviewed in the study said (p. 39): "The kind of people we want here will be attracted by schools only. As long as our schools are overcrowded we can't attract or keep them."

> There appears to be a consensus among recognized experts that new schools, if they are to remain integrated, should be built within white areas rather than in fringe areas.

The implications of this statement are truly astounding. Integrated fringe areas will not get new schools. But clearly, integrated areas will not develop as viable communities nor will they even remain integrated fringe areas if their schools become crowded or are allowed to deteriorate without replacement. If the Board recognized that integrating schools and neighborhoods must be part of one process, it would put its best facilities into these so-called "fringe" areas. Under the program of building new schools in white areas, the white areas will become whiter and the fringe areas will become new ghettos with old run-down schools. Statements like this one are the source of petitioners' belief that, when Negroes move in, whites and the Board of Education move out.

This narrowness of thought, the inability to understand the ~~this~~ the broad nature of the problem has led to greater segre-gation since Brown. Imagine the thinking pursuant to a desire to solve, not merely to accept defeat could produce the necessary result.

In East Brooklyn, a board of education seeking to make integration work rather than to justify why it fails to act would not seek to inflate the future possible growth in the number of minority school children in Brownsville. It would call attention to the reservoir of white children in the rapidly growing white population in the Midlands -- Flatlands -- Sheepshead Bay area immediately west of East Brooklyn. Children from that area could supplement the children from the Canarsie area in guaranteeing that even if the most dire (and unfounded) Board predictions of ethnic change in population were to come to pass, a racially balanced school population could be maintained in an educational park located in East Brooklyn.

Mr. Landers' affidavit also contains the following statement (at p. 5):

> Educational plants are rarely economical if their life is less than 40 or 50 years. Therefore, in selecting a site for an educational park, due consideration must be given to education in the future. From this point of view, the Flatlands site would appear to lead to de facto segregated schools.

This statement obfuscates the entire issue. It suggests that the alternatives are to build an untested, untried education park or do nothing. ~~In~~ But in fact, the ~~Board proposes or~~ alternatives ~~now under consideration are~~ are (1) a 105-million-dollar plan for the construction of seven schools which will by the location of the schools lock the entire East Brooklyn area into a program which will not desegregate one school but, will ~~inevitably~~ further increase the number of segregated schools in the area and (2) a plan which would provide quality integrated education with the same money. If an educational park is not economical unless we can prove that in 40 or 50 years it will not be segregated, then certainly the Board should be required to prove that its construction plan is "economical" in the sense that it will not produce segregated schools in 40 or 50 years. (In fact the Board's plan produces segregated education immediately) Of course no one can predict the ethnic make-up of a school population 40 or 50 years in the future. The ridiculous suggestion that petitioners must prove that in 40 or 50 years an educational park would be integrated is indicative of the negativism permeating the Board's attitudes towards any plan designed to provide integrated education without delay.

In sum, the Board has failed to take effective action to effectuate the conclusion reached in the Allen Report that segregation in the City's schools can and should be dealt with. Unless that conclusion is now to be reversed, explicitly or by implication, the Commissioner will have to exercise his authority to require the Board to take specific steps.

Even if the city-wide failure of the Board to take action to desegregate is ignored, its failure in East Brooklyn is clear. Its inability to formulate alternatives to the construction of segregated schools in East Brooklyn is plainly shown in petitioners' papers.

Attention is called to the three following specific factual matters only because they are typical of the actions of the Board and illustrate the variance between the Board's stated policy and its actions.

(1) Mayor Lindsay rejected the Board's plan to build two intermediate schools in East Brooklyn, I.S. 342 and I.S. 343, on the grounds that they would inevitably be segregated Negro-Puerto Rican schools. The 1967-68 school building program of the Board of Education indicates that once again the Board is requesting money to build ~~these~~ the same schools in the same areas rejected by the Mayor.

(2) The affidabit of Helen Efthim in support of the temporary stay sets forth how, after great struggle, local groups were able to move the site for Junior High School 275 from a ghetto area in which its students would have been almost entirely Negro and Puerto Rican to the white side of the color line in East Brooklyn, Linden Boulevard. To the consternation of the Brownsville community groups, one side of Junior High School 275's school district was drawn flush with the school at Linden Blvd. (the Negro-Puerto Rican neighborhood starts across the street) so that almost the entire student body is now white.

(3) In a totally ~~perverted~~ misapplied implementation of the Allen Report's recommendation that a 4-4-4 system be created (a four grade neighborhood elementary school, which in turn is followed by a four grade integrated high school), the Board altered elementary schools, both in East Brooklyn and both segregated Negro-Puerto Rican schools to the suggested four grade elementary school but then sent the fifth and sixth grades to I. S. ____ and I.S. _____, both of which were segregated. The paralysis which overcomes the Board when it attempts to deal with the issue of segregation is underlined by the fact that no other elementary school in the area has been switched to the 4-4-4 plan.

The undersigned organizations believe that the petitioners here are entitled to relief specifically with respect to the schools in East Brooklyn. We do not urge that the inability of the Board to act results from evil intent. T~~he issue is not~~ whether the Board has acted in good or bad faith is not the issue. T~~he issue is the effect of the Board's course of action, or inaction, on the children of East Brooklyn.~~ The issue, we submit is whether the Commissioner~~, we submit,~~ should ~~not~~ uphold Board decisions ~~that~~ to condemn ~~these~~ numerous children attending school, now, or in the future, to segregated education ~~for the indefinite future~~.

III. THE EDUCATIONAL PARK PROVIDES AT LEAST ONE ALTERNATIVE TO THE BOARD'S PLAN WHICH WOULD PROVIDE FOR INTEGRATED QUALITY EDUCATION.

The Board's unwillingness to take bold action to desegregate existing school facilities and insure that new facilities will be integrated is indicated by the way in which the Board has dealt with the educational park. The Allen Report strongly recommended the concept of the educational park as a means of providing quality integrated education. The original enthusiastic reaction of the Board to the concept is reflected in the pamphlet it prepared entitled "The Educational Park in New York City" (exhibit to petitioners papers). Thus, the Commissioner, the Board and the petitioners, as well as the undersigned organizations, are in agreement that the educational park properly located, utilizing all information available to us for the needs of the children, is an educationally sound method of dealing with de facto segregation.

Originally, the Board determined that the Flatlands area at the hub of the four East Brooklyn communities was an ideal site for an integrated educational park. The two major communities, Brownsville and Canarsie, one white and the other Negro and Puerto Rican, would insure that the park was integrated. The Board concluded:

> There seems to be a likelihood of stability with reference to the numbers of pupils being served and their ethnic composition. For example, demographic projections based on social and economic factors seem to predict little change in the ethnic character of the Canarsie or the Brownsville areas. The East New York area most proximate to the site being considered seems likely to gain White pupils as a result of a planned construction such as Fairfield Towers (1150 apartments), Meadowland Estates (5500 apartments) and Park Shore Village (5850 apartments). On the other hand, the East Flatbush areas will most probably gain minority group residents while losing White population, so that whatever ethnic balance is established will probably be maintained. ("The Educational Park in New York City," pp. (1965).

"It is not possible at this time to state with finality which geographic areas ought to be included within the school zone. Nevertheless, it is suggested that the following schools might well serve as a basis for discussion and evaluation since they meet the criteria for the creation of a viable educational park: J-68, 211, 252, 263, 275, 285. All six schools are approximately within a one-mile radius of the site (see Exhibit A). Population and ethnic data for the schools are as follows:

School	Enrollment	Negro	Puerto Rican	Others
J-68-K	1734	191	89	1454
J-211-K	1973	317	83	1573
J-252-K	1398	533	415	450
J-263-K	1599	924	642	33
J-275-K	1270	710	374	186
J-285-K	1589	176	52	1361
Totals	9563	2851	1655	5057
%	100	30	17	53

"The following building changes are suggested contingent upon the selection of the schools listed above:

"J-68-K to be converted to elementary school use to provide needed capacity.

"J-211-K to serve as an annext to Canarsie High School, which is only four short blocks distant. In view of the movement to a four year high school, this space will be badly needed.

"J-252-K to be converted to elementary school use to provide relief for over crowded Brownsville schools, and later on, East Flatbush schools.

"J-263-K to be converted to elementary school use to relieve over crowded Brownsville schools.

"J-275-K to be converted to elementary school use to relieve over crowded Brownsville schools.

"J-285-K to serve as an annex to Tilden High School, which is across the street.

"As indicated above, high school space is badly needed.

> "It will also be possible immediately to eliminate the following projects from the Building Program of the Board of Education:
>
> "P-245-K in vicinity of J-263-K ("a" money)
> "P-363-K in vicinity of J-68-K ("b) money)
> "P-361-K in vicinity of J-275-K (long range plans)
>
> "With existing building practices, it would require a miniumu of 12 acres to house these 9,500 pupils and an additional 6 acres for recreational space, at a total cost of approximately $27,000,000. The economics resulting from the availability of land, the sharing of facilities, more economical use of space, mass building practices, and the like should lower the cost considerably. Of course there will be some added expenses resulting from conversions of buildings, but hardly enough to offset the savings. It is also possible that funds may be available in the form of federal grants from the Urban Renewal Administration.
>
> "The use of 18 acres is based upon present building programs. However, an educational park, if it is to carry out its educational, recreational, and social purposes, will require much more land that this. These greater space requirements, while adding immeasurably to the significance of the educational park, would not under existing conditions add a great deal to the cost."

Petitioners believe that the above quoted study provided an excellent realistic and feasible alternative to a school program which "reinforces substantially the historic pattern of building on sites within the most segregated areas."

Not only has the Board continued its "historic pattern" but it has worked considerable financial sabotage to the subject of the above quoted study by informing the Board of Estimate that many years of experimentation with educational parks in areas not involving crucial problems of imbalance existing in East Brooklyn would be necessary before an educational park could be built in the Flatlands area. Accordingly, the Board of Estimate has leased the City owned property to a private concern in industrial development for thirty years. Unless that lease can be disturbed, the cost of land for a suitable Flatlands site would now be higher and additional time would be required for land clearance and tenant relocation.

9. BOARD OF ESTIMATE HEARING - SEPTEMBER 23, 1965:

On September 23, 1965, at a public hearing, the Board of Estimate was asked by LOUIS BROIDO, Commissioner of Commerce and Industrial Development to designate the Flatlands site for industrial development, with the understanding that a thirty year lease to the New York City Industrial Development Corporation would be executed by the City.* Many tax payers opposed this designation on the grounds that the site was needed for the Board of Education's educational park. ADRIAN BLUMENFELD, Administrator of the School Planning and Research Division of the Board of Education, which on September 29, 1965 adopted the 1966-1967 School Building Program as aforementioned, testified on behalf of the Board of Education. Included in his testimony was reference to a press release dated September 23, 1965 in behalf of the Board of Education by its President, LLOYD K. GARRISON, which said among other things:

"We have determined that the concept of

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* (Subsequent to approval by the Board of Estimate, a lease was executed and then a sub-lease to the Rentar Development Corporation whose business address is shared with Rentar Truck Renting Corp. in Queens County for the actual development of the property.)

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

- -X

In the Matter of the Appeal of

MILTON A. GALAMISON, THELMA HAMILTON,
HELEN EFTHIM, CURTIS GRACE, et al.,

From the continuing action of the Board
of Education of the City of New York in
refusing to institute an education park
in East Brooklyn, etc.

- -X

STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

LLOYD K. GARRISON, being duly sworn, deposes and says as follows:

I am President of the Board of Education of New York City. I am making this affidavit on behalf of the Board for submission to Commissioner Allen in the above entitled proceeding. This affidavit is in support of an application to the Commissioner by the Corporation Counsel for an adjournment of the proceedings until December 1, 1966 (or earlier, if the progress of the Board's plans should permit, as set forth below).

For some time prior to the commencement of the above proceeding, and as a result of the more intensified consideration of the educational park concept by the Board in connection with the development of the plans for the Co-op City educational park, the Board, through its Committee on Integration, began studying the possibility of locating an educational park in the Brownsville-East-Flatbush-Canarsie-

East New York area, at an appropriate location other than that of the Flatlands site which had been designated by the City for an industrial park. The Committee also explored the possibility of making an arrangement with the Department of Commerce for taking a portion of the industrial park site and utilizing it for an educational park. This turned out to be impractical, and the Committee continued its search for other possible locations.

The Board's plans have progressed to the point where sites for two educational parks, one in East Flatbush and one in East New York, are now being actively explored by the Integration Committee and the Board's staff, with the knowledge and approval of the Board. The studies which are under way will of course embrace the whole range of questions involving the locating of the future intermediate schools which the area requires, the effect of these on the schools in Brownsville, and the zoning changes and transportation facilities which will be involved.

A new feature has been added to the already complex planning agenda, namely, the possibility of including housing accommodations along with schools. Under the dual occupancy provisions of the New York City Educational Construction Fund Act signed by Governor Rockefeller on August 4, 1966, the Board believes that the possibilities of combining one or more school buildings with housing on educational park sites should be thoroughly explored. Combined structures of this sort may help to stabilize neighborhoods, provide needed accommodations for teachers and parents, aid in the integration process, and improve the quality of teaching.

Under the Act combined structures are not limited to school buildings and apartment houses. School buildings may be erected in combination with office buildings, community centers, theatres, hotels, industrial establishments, etc. Tax exempt bonds may be issued by the Fund to pay for the school portions of combined occupancy structures. The possibilities in the way of imaginative community planning are very great, and the Board believes it would be a mistake to project an educational park without taking these new possibilities into account.

There are of course serious time problems. The need for proceeding with the building of particular schools may be so urgent as to preclude the delays which would be inherent in planning for combined occupancy structures. On the other hand, the Board is determined to press forward with the development of these plans with all possible vigor.

With regard to the area under consideration in this litigation, the Board now foresees a timetable which would run approximately as follows:

1. Completion by early fall of the Board's study of the possibilities of establishing an educational park, or possibly two educational parks in the area, with the related location of new schools and the accompanying zoning changes.

2. If the Board should conclude that such a development would be feasible and desirable, the following steps would be taken:

a. The Board would canvass the views of the Local School Boards involved.

b. It would canvass the views of interested community groups, and of the groups represented in this litigation.

c. Public hearings would then be held prior to final action by the Board.

3. In conjunction with its consideration of the educational park concept in the area in question, the Board would actively explore with the New York City Educational Construction Fund and concerned City agencies the possibilities in the way of combined structures as outline above. Any plans of this sort which might appear to be desirable, and feasible within the necessary time schedules for the new schools, would of course be canvassed with the various groups and included in the public hearings as described above.

4. In the light of the complex planning involved, the magnitude of the possible undertakings, and the numbers of groups and City agencies which would be concerned with the shaping of decisions, the Board believes that it is not realistic to expect that final decisions could be arrived at by the Board before December 1, 1966. Since such decisions might render this litigation moot, it is hoped that the proceedings may be adjourned by the Commissioner as requested by the Corporation Counsel.

5. The Board will be glad to report periodically to the Commissioner and the parties as to the progress of

its plans and as to any changes in the timetable which circumstances might compel.

Subscribed and sworn to
before me this 10th day
of August, 1966.

Harold F. Hay
HAROLD F. HAY
Notary Public, State of New York
No. 41-1717000
Qualified in Queens County
mission Expires March 30, 1967

Lloyd K. Garrison
LLOYD K. GARRISON

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

- X

In the Matter of the Appeal of :

MILTON A. GALAMISON, THELMA HAMILTON, : **AFFIDAVIT**
HELEN EFTHIM, CURTIS GRACE, et al.,
:
From the continuing action of the Board
of Education of the City of New York in :
refusing to institute an education park
in East Brooklyn, etc. :

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WALTER THABIT, being duly sworn, deposes and says:

That he is a city planning expert and makes this affidavit in response to the conclusion stated on page 2 of the Lloyd K. Garrison affidavit that a Flatlands Site for an Education Park is impractical.

That he is a graduate of Brooklyn College, 1948, B.A. in design; holds a Master of Arts degree in sociology from the New School of Social Research, 1952; and the degree of Master of City Planning from the Massachusetts Institute of Technology, 1953. Deponent was formerly Research Director for the New York Chapter of the American Institute of Architects' Committee on Housing, 1952-1953, and was the planning analyst in the Department of City Planning, New York City, 1953-1954. Your deponent was also the Director of Research and head of the Master Plan Section of the

Baltimore Department of Planning from 1954 through 1958. Deponent has been an independent city and regional planning consultant with offices at 76 Reade Street, Borough of Manhattan, City and State of New York, from January 1959 up until the present time.

Since January, 1959 deponent has worked on a wide variety of projects including housing rehabilitation, renewal planning, industrial studies, market analyses, employment research and anti-poverty planning. Deponent has performed these services for City and State agencies as well as local community organizations in Philadelphia, Newark, Jersey City, Hoboken, Utica and several local areas of New York City.

In recent years deponent has become increasingly involved with anti-poverty planning, serving as consultant to Mobilization For Youth, the Congress of Racial Equality, the League for Industrial Democracy, and the City of Hoboken, among others.

Deponent has had extensive experience in school planning. In 1954 your deponent prepared an approach in school planning and the distribution of capital funds for New York City schools while working as an analyst for the Department of City Planning. In Baltimore deponent was responsible for the review of school sites and the updating of the master plan for schools in the year 1955-1956. Your deponent has acted as unpaid consultant on school planning to several local community groups in New York City and has written on and taught school planning including the concept of the education park. In recent years your deponent through his firm has undertaken school planning in Jersey City, Newark, Hoboken, Powelton Village, downtown Brooklyn and the lower east side of Manhattan.

In addition to consultations, your deponent is a lecturer in physical planning at Hunter College's Graduate Division of Urban Planning, is a full member of the American Institute of Planners, President of Planners for Equal Opportunity, and holds membership in the American Society of Planning Officials, the International Federation of Housing and Planning, and the Regional Science Association. Deponent is the past president of the Metropolitan Committee on Planning, a member of the Board of Directors of the Citizens Housing and Planning Council and member of the Executive Committee of ARCH (Architects Renewal Committee in Harlem), all in New York City. Your deponent has written and lectured widely and has articles and reviews in professional journals, newspapers and magazines.

Deponent was requested by the attorney for the petitioners in the above captioned matter to evaluate the area in the vicinity of the Flatlands industrial park site as well as the site itself in order to determine whether suitable sites for an educational park on the scale of that discussed in the Board of Education's publication "Concept For Discussion" dated April, 1965 could still be assembled in that area. After a study and evaluation of the area and its development prospects, which included a visual inspection of the Flatlands industrial park site and the surrounding area made in the company of said attorney for the petitioners, Sandra Gerber and Hume Smith, petitioners, Herman Joseph, Chairman of Brooklyn EQUAL, and Ethel Schwabacher, staff member of the New York Urban League, deponent concludes that at least three sites deserve serious consideration for the development of an educational park in the Flatlands area of Brooklyn.

In making said visual inspection, a map of land use was consulted on the trip and new industrial and residence developments were noted. Existing development was evaluated and the field notes made on August 13, 1966 as aforesaid were re-evaluated and developed with the aid of said land use map.

Several planning elements were considered in selecting these sites:

First, a most significant criterion was that the site should be easily accessible to both white and non-white communities expected to be served by the facility.

Second, that a suitable sized site could be assembled without excessive cost (a site of approximately 75 acres).

Third, that displacement of either business or residence should be held to a reasonable minimum.

Fourth, that the site should be contiguous though not necessarily regular.

Fifth, that no part of the site, if possible, should be separated by a major traffic artery.

While one of the sites selected is wholly outside the Flatlands industrial park project area, two of the sites proposed do use portions of this land. Analysis suggests that part of the demand for industrial land has already been satisfied in other parts of the Flatlands community, indicating that a cut in space reserved in the Flatlands industrial park site itself is not unreasonable. It should be noted that in the years action has been pending on the Flatlands industrial park, industrial development has been taking place wherever it can find a foothold, without any basic controls on its intrusion into residential areas or any thought given to large-scale community facilities such as an educational park. How this development has preempted space in the surrounding community is evident in the discussion of the three selected sites following.

Even now, land in the Flatlands industrial park may continue to be somewhat less attractive than other industrially-zoned vacant land in the community. Asking prices for the industrial park land may be higher, restrictions on use of the land will be greater, processing time in coming to agreements may be longer. Thus, the community is being faced with an artificially induced land shortage as well as uncontrolled development resulting in an undesirable mixture of residential and industrial uses.

Under these circumstances, an inflexible policy restricting the use of the Flatlands industrial park land to industrial development is indefensible. Assuming the need to develop a rational set of land uses for the larger surrounding community, at least part of the Flatlands industrial park site could still be set aside for educational park uses. Other parts of the surrounding community, already attractive to new industry, might be "traded" to permit a rational arrangement of land uses.

Based on all these considerations, three sites were selected as shown on the accompanying map prepared by deponent, copy of which is annexed hereto and made a part hereof.*/ A brief discussion of these sites, their advantages and disadvantages, follows:

1. Linden Avenue Site

The Linden Avenue Site, because it lies closest to the locus of the white - non-white population, most nearly approximates the perfect site, in some ways better than the original Flatlands industrial park site itself. It consists of essentially three components: First, a piece of 25 to 30 acres now included in the Flatlands industrial park site; second, the parcels making up P.S. 260 and the two parks to the south totalling approximately 30 acres. Of this site totalling between 80 and 85 acres, only the third piece is heavily built-up at present. In sum, this site is 80 to 85 acres.

Of this total, only the third part of 30 acres is heavily built up at present. About 30 percent of this site is covered by industrial buildings, many of which have recently been constructed. Perhaps a hundred residential structures are also on the site, predominantly two-family brick structures. These structures are in fair shape; there is some non-residential use mixed in with the residence. There is a considerable amount of marginally used commercial and vacant area as well.

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*/ This map was prepared on an official land use map of the City Planning Commission on a scale of 600 feet to the inch. Two sections, section 17 and section 23, were joined. Outlines of the Flatlands industrial park site were based on data provided by the Housing and Redevelopment Board.

Taking this site as a whole, it would impose neither a financial nor design burden on the development of an educational park. As a whole, the site would not be expensive to acquire. It could be attractively designed with the existing playfields continued in that use and the existing school serving as a nucleus of an expanded physical plant. The 25 acre playfield could be used to 100 percent of capacity as part of the educational park complex.

2. Flatlands South Site

This possibility uses even more of the Flatlands industrial part site area in conjunction with approximately 7 blocks directly south of the site. The Flatlands industrial park area amounting to about 50 acres while the blocks to the south come to 25 acres, making a total of 75 acres.

The area to the south is sparsely developed, most of the land is owned by the Transit Authority, a relatively minor portion of which is being used as a subway car yard. Rationalized, this use might stay, it could be moved elsewhere, it could be bridged or the entire subway line might someday be rebuilt underground. In any event, the majority of the land could easily be used for playfields and positive steps taken to ensure the safety of students and separate students from the subway line.

This would be the least expensive alternate, still permitting half the Flatlands industrial park site to be used for industrial purposes. It is half a mile further than the top-rated Linden Avenue site, but is still easily accessible to both white and non-white populations.

3. Wortman Avenue Site

This site does not rely on Flatlands industrial park land. It is bounded by Stanley, Pennsylvania, Fairfield-Flatlands and Williams Avenues, making an almost square site of about 75 acres. This site makes use of the existing P.S. 260 and associated playfields as does the Linden Avenue site, plus 50 acres to the east.

The 50 acres to the east, until recently largely undeveloped, is still two-thirds vacant or occupied by marginal uses including a few scattered houses. On seven of its 15 blocks, however, substantial and in most cases, relatively new, industrial plants have been constructed, one or two of which cover an entire block. These buildings will be expensive to acquire, though when the overall cost of assembling the site is calculated, the average cost per square foot should be less than double that for vacant and marginally used land. If the two blocks with the most substantial development were excluded from the site, the cost would be reduced to about one and a half times that of vacant and marginally used land.

In conclusion, your deponent is of the opinion that two very practical education park sites on the scale of the Board's "Concept For Discussion" of April, 1965 could be assembled in the Flatlands area by trading industrial park land with the current developers and that one very practical site could also be assembled on the scale of the Board of Education's "Concept for Discussion" of April, 1965 without making any use whatsoever of industrial park lands.

WALTER THABIT

Sworn to before me this

24 day of August, 1966.

JOHN E. SILVERBERG
Notary Public, State of New York
No. 41-8999915
Qualified in Queens County
Commission Expires March 30, 1968

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

- X

In the Matter of the Appeal of :

MILTON A. GALAMISON, THELMA HAMILTON, : **AFFIDAVIT**
HELEN EFTHIM, CURTIS GRACE, et al., :

From the continuing action of the Board of Education of the City of New York in refusing to institute an education park in East Brooklyn, etc. :

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HERMAN JOSEPH, being duly sworn, deposes and says:

That he is a citizen, taxpayer and resident of the City and State of New York and makes this affidavit in opposition to the affidavit of Lloyd K. Garrison, sworn to August 10, 1966, requesting an adjournment of the proceedings in the above entitled matter until December 1, 1966.

Your deponent has read the affidavits of Walter Thabit, Arthur H. Mittelstaedt and Caswell Miles herein and can see no basis whatsoever for the assumption which is apparently the present policy of the Board of Education of the City of New York that there is no possibility of continuing with its plan as set forth in "Concept For Discussion" of April, 1965 for an education park in the area of Flatlands, Brooklyn, New York.

The aforementioned affidavits of Walter Thabit, Arthur

H. Mittelstaedt and Caswell Miles, all experts in the field of city and education planning, clearly show that there are several Flatlands sites still available for an education park in East Brooklyn, New York on the same scale as and with the same benefits as described in the Board of Education's 1965 plan which the Board of Education would now like to completely forget.

Since there are several sites still available in the Flatlands area of Brooklyn, the Board's refusal to continue to develop its 1965 education park plan is totally unreasonable, capricious, unnecessary, ill advised and calculated to cause irreparable damage to the children of East Brooklyn.

There is absolutely no need to discuss the two parks which the Board is allegedly considering for East Brooklyn and to wait until December 1, 1966 until the Board can develop those plans. Once again the Board has told the Commissioner absolutely nothing concerning its alleged consideration of two other parks. Respondent expects the Commissioner to sit still while no commitments of any kind are made and while the children of the area in question are deprived of the very obvious benefits that could derive from an immediate development and implementation of the 1965 plan.

The Garrison affidavit reveals, as was previously known by all parties concerned, that there was absolutely no substance to respondent's incredible reason for refusing to proceed with its 1965 plan: the desire to study and evaluate two parks in the Bronx before making any plans for an East Brooklyn park. And the Garrison affidavit further reveals, as was known previously by all parties concerned, that there was no substance to the argument that "In the present and projected ethnic trends, it is clear that the Flatlands site is not adequate as a center for integrated learning" (affidavit of Jacob Landers, page 5) since if that were true Dr. Garrison would not have stated, as he did, that "The Committee also explored the possibility of making an arrangement with the Department of Commerce for taking a portion of the industrial park site and utilizing it for an educational park." (Emphasis supplied.) The argument of the ethnic unsuitability of the Flatlands site was of course also destroyed in the affidavits of Annie Stein and Helen Efthim.

The request for a delay until December 1st is just one further attempt to lead the petitioners and the Commissioner away from Flatlands to some other area which could not achieve the degree of desegregation and integration that can be achieved by the development and implementation of the Board of Education's 1965 plan. Accordingly, your deponent is unalterably opposed to a delay beyond the second Tuesday in November at the expense of the children of East Brooklyn. These issues are far too serious and far too important to be kicked around by people whose motives are wholly political even if the respondent is perfectly willing to play that kind of a role with the future of our children.

Herman Joseph

Sworn to before me this

24 day of August, 1966.

JOHN E. SILVERBERG
Notary Public, State of New York
No. 41-8999915
Qualified in Queens County
Commission Expires March 30, 1968.

Galamison

Nº 7682

The University of the State of New York

The State Department of Education

Before the Commissioner

IN THE MATTER

of the

Appeal of MILTON A. GALAMISON, THELMA HAMILTON, HELEN EFTHIM, CURTIS GRACE, et al., from the continuing action of the Board of Education of the City of New York in refusing to institute an education park in East Brooklyn.

John E. Silverberg, Esq. .... Attorney for Appellants

Hon. J. Lee Rankin .... Attorney for Respondent
Corporation Counsel
John J. Loflin, Esq., of Counsel

The appellants in the above-entitled matter appealed from the refusal of the Board of Education of the City School District of the City of New York to plan and provide for an educational park in East Brooklyn, and requested a Stay Order restraining the said Board of Education from proceeding with the selection and acquisition of sites, and from awarding architectural and construction contracts for seven certain school projects. The Stay Order was granted, and now, after examining the pleadings, affidavits, briefs and surveys, I am convinced that, in the light of the entire record before me, the respondent Board of Education should carefully reconsider its plans for this area, based upon the material now set forth in the papers of this case, and prepare and submit to me such new plans as the exigencies warrant on or before December 1, 1966.

IT IS SO ORDERED.

IT IS FURTHER ORDERED, that the Stay Order, hereinabove referred to, be continued pending my further order in the premises.

IN WITNESS WHEREOF, I, James E. Allen, Jr.
Commissioner of Education of the State
of New York, for and on behalf of the
State Education Department, do hereunto
set my hand and affix the seal of the
State Education Department, at the City
of Albany, this 30th day of September
1966.

SEAL

/s/ James E. Allen, Jr.

COPY

Commissioner of Education

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

- -X

In the Matter of the Appeal of

MILTON A. GALAMISON, THELMA HAMILTON,
HELEN EFTHIM, CURTIS GRACE, etal.,

From the continuing action of the Board
of Education of the City of New York in
refusing to institute an education park
in East Brooklyn,"etc.

- -X

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

LLOYD K. GARRISON, being duly sworn, deposes and says:

1. I am the President of the Board of Education of the City of New York.

2. On August 10, 1966, I submitted to Commissioner Allen an affidavit in this case, the substance of which was that the Board of Education was investigating possible available sites for an educational park, or possibly two educational parks, in Brooklyn in the general area of the Flatlands, which the City has leased for an industrial park. I stated further that in order to give the Board adequate time in which to canvass the possibilities, to consult with local groups and to arrive at final conclusions, which could then be transmitted to the Commissioner for his consideration in connection with the pending suit, an extension of time would be needed up to December 1, 1966.

3. By order dated September 30, 1966, the Commissioner granted this extension of time, and continued

the stay against construction of P-245-K, P-347-K, P-237-K, P-301-K, I.S. 363-K, I.S. 326-K and I.S. 366-K, in the area in question, including Brownsville.

4. The Board's staff proceeded as expeditiously as possible and, together with a committee of the Board, visited several sites and reported back to the Board. Two possible sites in particular commended themselves for serious consideration -- one a little to the west of Canarsie and the other a little to the east of it; the staff recommended that both be given serious consideration by the Board. In other words, under that proposal, there would be two moderate-sized parks instead of one very large one.

5. The time and energies of the Board were, however, so consumed with other policy questions of peculiar urgency over the opening and administration of I.S. 201 and its feeder schools, and over the conditions of schools in deprived areas generally, that the Board was not able to complete its deliberations regarding the building program in Brooklyn.

6. The Board has had some very preliminary informal discussions with local groups in Brooklyn regarding the possible locations. These discussions have not gone far enough. Time is needed to carry them further and to involve more parents associations and others, prior to any public hearings, which the Board does not wish to set until its own thinking has more fully matured. For this reason an extension to December 1st will not give the Board adequate time to do what needs to be done in an orderly and intelligent fashion.

In addition, Professor Cyril Sargent, who is the Board's educational consultant for the Co-op City educational park in the Bronx, and who is also the educational consultant to the Human Resources Administration, is in the process of conducting a special study of the educational desirability of parks in Brooklyn, Philadelphia and Baltimore, Md. Last year we had decided jointly with the superintendents of all three cities, and their respective Boards, prior to the initiation of the pending suit, to undertake such a project, in the course of which it was hoped that each of the cities would learn something from each of the others and that a pooling of their experience and ideas would be fruitful.

This study was suggested by the United States Office of Education. It is financed with funds made available under Title III of the Elementary and Secondary School Education Act of 1965. Its purpose is to explore the possible implications of educational parks for integration, quality education and for economies in school operation under varying circumstances in the three different communities.

Because of Dr. Sargent's time consuming responsibilities with the Human Resources Administration and in the Co-op City study, he was not able until recently to begin the Brooklyn-Philadelphia-Washington study. He is now actively engaged in it. His report is due at the end of January. The Board would like to have the benefit of it before arriving at final decisions with regard to Brooklyn.

7. A further extension of time to February 28, 1967 is therefore requested. In making this request, the Board wishes to emphasize the following points:

(i) Educational parks of the sort that we are constructing in the Bronx and are considering for Brooklyn, have no prototypes in this country. They are experimental and untested.

(ii) They involve a very great capital expenditure.

(iii) Their integration objectives may be defeated by population shifts unless the demographic studies are made with extreme care and unless community attitudes are prepared in advance as thoroughly as possible. This preparation is of the utmost importance but ways and means of going about it have not yet been thought through. In particular, the educational potentialities to be gained through the pooling of facilities in cluster arrangements on large sites need to be spelled out and developed. Dr. Sargent, together with staff members of the Board of Education, has been developing such a program for Co-op City. It gives indication of promise and plans are now under way to publish the plan for circulation and discussion among interested groups in Brooklyn as well as in the Bronx.

8. All of this will take time. The Board is no more anxious for delays than are the petitioners in this suit, because its building program in the area in question has been stayed pending a decision by the Commissioner, and there is urgent need of arriving at conclusions at the earliest possible moment. In a situation, however, as important and complex as the one with which we are now dealing, much harm can come from hasty and ill-considered action; indeed the success of any program can be seriously jeopardized by premature action.

9. At this time the Board would also urge that your stay order be modified to the extent of permitting us

to proceed with the construction of two of the four elementary schools mentioned in the stay order. These two schools are Public Schools 245 and 347, Brooklyn.

The construction of these two schools is indicated regardless of the outcome of this proceeding. In fact, they are only tangentially involved since the petitioners do not suggest that the elementary schools be included in the educational park. They do contend that if all the existing junior high schools were to be converted into elementary schools then there would be no need for additional schools to relieve elementary school overcrowding. However, it would still be necessary to build elementary schools to replace the existing obsolescent plant and to provide additional capacity.

Our long-range budget plans have already provided for precisely that. Our budget documents prepared prior to the institution of these proceedings reveal that the following schools in the attendance areas to be served by Public Schools 245 and 347 are scheduled for replacement: Public Schools 156, 175, 150, 125. For example, in our 1965-66 Capital Budget request Public School 347 was listed as a replacement school for Public School 156. By the following year overcrowding had increased to such an extent that Public School 347 had to be changed from that of a replacement school to that of an additional school to relieve overcrowding. The outcome of this case might determine merely whether these two schools are used primarily to relieve overcrowding, or to consummate our desire to replace obsolescent facilities. But it cannot change the imperative need for their construction.

We are pressing this request at this time because construction funds are available for these two schools and because they are now ready to be progressed expeditiously. Any further delay in the construction of these schools will only prolong the time that approximately 3,000 minority-group children will unnecessarily suffer unconscionable overcrowding in obsolescent buildings. Even if the overcrowding can be overcome in time by other means, the obsolescence cannot be.

In summary, since these schools are necessary and would have to be built in the foreseeable future in any event, there would seem to be no justification for continuing the stay as to them.

The statistical basis for my conclusion that Public Schools 245 and 347 will be needed regardless of the outcome of this appeal will be found in the companion affidavit of Mr. Adrian Blumenfeld, Director of the Division of School Planning and Research filed herewith.

10. For all these reasons the extension is sought until February 28, 1967 and we respectfully request that the stay order now in effect be amended so as to exclude P.S. 245-K and P.S. 347-K therefrom.

Sworn to before me this
23rd day of November, 1966
Sidney Gerson

SIDNEY GERSON
Commissioner of Deeds
City of New York - No. 4-325
Certificate filed in Kings County
Commission Expires June 29, 1967

Lloyd K. Garrison
LLOYD K. GARRISON

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

- -X

In the Matter of the Appeal of

MILTON A. GALAMISON, THELMA HAMILTON, HELEN EFTHIM, CURTIS GRACE, et al.,

From the continuing action of the Board of Education of the City of New York in refusing to institute an education park in East Brooklyn, etc.

- -X

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

ADRIAN BLUMENFELD, being duly sworn, deposes and says: I am the Administrator of the School Planning and Research Division of the Board of Education of the City of New York.

I make this affidavit in support of the application of the Honorable Lloyd K. Garrison, President of the Board of Education of the City of New York, on behalf of the Board, to remove P.S. 245-K and P.S. 347-K from the scope of the order of the Commissioner of Education in the above entitled appeal. The order referred to has the effect of staying the Board of Education from taking further steps toward construction of these two elementary schools located in the Brownsville section of Brooklyn, New York.

It is my understanding that this order was entered at the request of the appellants on their representation that these new elementary schools might not be needed if an educational park were built in the vicinity to serve certain junior high schools in Brownsville and upon the transfer of these junior high students the vacated schools could then be converted into elementary school uses. However, for the reasons stated below we have concluded that P.S. 245 and P.S. 347 will be needed regardless of the outcome of this pending appeal.

The need to construct additional elementary school facilities in Brownsville is occasioned by four principal factors, each having its own particular urgency.

1. Enrolment Projections

The last decade has shown a remarkable change in the picture of resident births in the Brownsville community. (See chart annexed hereto and marked Exhibit A).

Based on standard methods of projections it is estimated by the School Planning and Research Division that the total elementary needs of Brownsville for the year 1971-1972 will be approximately 24,600.

Including all projects presently under construction in the Brownsville area there will still be need for approximately 6,000 additional sittings in the primary school level.

2. Possible Changeover

The suggestion has been made that if the junior high schools in Brownsville are converted to elementary use, their capacity would offset these needs. Even if all three of the Brownsville Junior High Schools 252, 263 and 275 were so converted their total capacity would be approximately 4,000. This leaves 2,000 elementary school seats short.

3. Age of Buildings

The Brownsville elementary school plant includes elementary schools whose replacement has been incorporated in the Building Program of the Board of Education for some time, e.g. P-156, 125, 150, 175, 284 and 165. The total capacity of these six (6) schools is approximately 7,123. All of these buildings were constructed in the period before World War I.

In the Community Studies for Brooklyn published May 2, 1966, the detailed data concerning the replacement of these projects will be found under Master Plan 1967-1973 (see attached Exhibit B - project circled for special emphasis.) But as far back as September 1964, when the Board adopted the 1965-66 School Building Program, the following projects appeared under the priorities listed:

FOR SITE ACQUISITION

Priority	School Project	Location	Purpose of Project
108	P-347-K	Vic. Brownsville	Replace P-156
109	P-237-K	" "	" P-125 and P-150
In the long range program:			
159	P-301-K	" "	Replace P-165
193	P-342-K	" "	" P-175
200	P-343-K	" "	" P-284

4. Present Need for These Two Elementary Schools

It is contended by appellants that the conversion of the three Brownsville Junior High Schools (J-252, 263 and 275-K) to elementary schools would provide sufficient capacity for the Brownsville neighborhood. This is not accurate as is shown above. However in any event after all the necessary intermediate schools to house Brownsville's children are built, and even if the three now existing junior high schools were to be converted into elementary schools, we would still require Public Schools 245 and 347 to relieve remaining elementary overcrowding and to replace obsolescent schools. They are especially needed to relieve overcrowding during the years required to build the new intermediate schools.

In light of the above considerations the School Planning and Research Division of the Board of Education strongly recommends that new P-245 and P-347-K, listed in the current Capital Budget of the Board of Education for appropriations of 2.8 million dollars each for construction during the course of the current fiscal year, be released from the stay order of the Commissioner of Education of the State of New York.

Sworn to before me this
28th day of November, 1966

DANIEL W. KINGSTON
Notary Public, State of New York
No. 41-7273100 Qualified in Queens County
Cert. Filed in N. Y. Co.
Term Expires March 30, 1968

ADRIAN BLUMENFELD

PROGRAMMING SECTION
SCHOOL PLANNING & RESEARCH DIVISION

HISTORY OF BIRTH DATA-BROWNSVILLE

	ALL CLASSES	WHITE		NON-WHITE		PUERTO RICAN	
YEAR	NUMBER	NUMBER	%	NUMBER	%	NUMBER	%
1955	2 398	1 376	57.4	684	28.5	338	14.1
1956	2 633	1 265	48.0	853	32.4	515	19.6
1957	2 676	1 094	40.3	914	34.2	668	25.0
1958	2 860	969	33.9	1 028	35.9	863	30.2
1959	2 915	906	31.1	1 046	35.9	963	33.0
1960	3 265	897	27.5	1 191	36.5	1 177	36.0
1961	3 593	775	21.6	1 476	41.1	1 342	37.3
1962	3 981	658	16.5	1 805	45.4	1 518	38.1
1963	4 235	575	13.6	2 103	49.6	1 557	36.8
1964	4 343	534	12.3	2 370	54.6	1 439	33.1
1965	3 861	390	10.1	2 324	60.2	1 147	29.7
CHANGE 1955 – 1965	+1463 (+61.0%)	-986	-71.7	+1640	+239.8	+809	+239.3

EXHIBIT A

SCHOOL PLANNING & RESEARCH DIVISION
ADRIAN BLUMENFELD
ADMINISTRATOR

[illegible] SACHS
DIRECTOR

COMMUNITY Brownsville DATE 5/2/66

C. ESTIMATED NEED (GR. K-4)

1. ADJUSTED K-4 ENROLLMENT PROJECTION (1971-1972)	18 883	18 883
2. ESTIMATED ADDITIONAL KINDERGARTEN REQUIREMENTS	1 869	1 869
3. ESTIMATED PRE-KINDERGARTEN REQUIREMENTS	3 861	
4. TOTAL K-4 ENROLLMENT PROJECTION (1971-1972)	24 613	20 752
5. AVAILABLE FUTURE K-4 CAPACITY	21 837	21 837
6. ESTIMATED FUTURE K-4 OVERLOAD	+ 2 776	- 1 085

C. ESTIMATED NEED (GR. 5-8)

1. ADJUSTED 5-8 ENROLLMENT PROJECTION (1971-1972)	12 504	12 504
2. ADDITIONAL REQUIREMENTS IF ANY	–	
3. ADDITIONAL REQUIREMENTS IF ANY	–	
4. TOTAL 5-8 ENROLLMENT PROJECTION (1971-1972)	12 504	12 504
5. AVAILABLE FUTURE 5-8 CAPACITY	3 864	3 864
6. ESTIMATED FUTURE 5-8 OVERLOAD	+ 8 640	+ 8 640

D. MASTER PLAN 1967-1973 (GR. K-4)

FOR PUBLIC HEARING, LOCAL SCHOOL BOARD

TO BE CONSTRUCTED SCHOOL	STATUS*	CAPACITY	TO BE SURR. SCHOOL	CAPACITY
P-237	C	1500	–	–
P-301	a	1500	–	–
P-300	LR	1500	P-156	1967
			(P-125	538
P-372	LR	1200	(P-150	1264
P-373	LR	1500	P-175	1412
P-374	LR	1200	P-284	1231
P-375	LR	1200	P-165	711

TOTAL 9600 TOTAL 7123

NET GAIN 2477

D. MASTER PLAN 1967-1973 (GR. 5-8)

FOR PUBLIC HEARING, LOCAL SCHOOL BOARD

INTERMEDIATE SCHOOL PLANNING AREA NO. VII

COMMUNITY	OVERLOAD	TO BE CONSTRUCTED SCHOOL	STATUS*	CAP.
Brownsville	8640	I.S.326	C	1800
East New York	2910	I.S.366	C	1800
Canarsie	1273	I.S.342	a	1800
Flatbush-		I.S.343	a	1800
East Flatbush	3082	I.S.361	a	1800
Midwood-		I.S.385	b	1800
Flatlands	1598	I.S.386	b	1800
		I.S.387	b	1800
		I.S.388	LR	1800
		I.S.381 (Repl.I.S.64, Cap.1650)	LR	1800
		I.S.382 (Repl.I.S.171, Cap.1365)	LR	1800
TOTAL	17503	TOTAL		16785

MASTER PLAN 1966-1967 (GR. K-4)

ADOPTED SEPTEMBER 29, 1965

TO BE CONSTRUCTED SCHOOL	STATUS*	CAPACITY	TO BE SURR. SCHOOL	CAPACITY
P-245	C	1500	–	–
P-347	C	1500	–	–
P-237	a	1500	–	–
P-301	a	1500	–	–

MASTER PLAN 1966-1967 (GR. 5-8)

ADOPTED SEPTEMBER 29, 1965

INTERMEDIATE SCHOOL PLANNING AREA NO. VII

COMMUNITY	OVERLOAD	TO BE CONSTRUCTED SCHOOL	STATUS*	CAP.
Brownsville	8155	I.S.302	C	1800
East New York	3349	I.S.326	C	1800
Canarsie	3439	I.S.363	C	1800
Flatbush-		I.S.342	b	1800
E. Flatbush	2917	I.S.343	b	1800
Midwood-		I.S.361	b	1800
Flatlands	1221	I.S.366	b	1800

ADOPTED 1966-1967 CAPITAL BUDGET PROVISION

SCHOOL	APPROPRIATION	PURPOSE
P-245	$2.8 Million	Add.Cap.
P-347	2.8 Million	Add.Cap.
P-237	a	Add.Cap.
P-301	b	Add.Cap.

ADOPTED 1966-1967 CAPITAL BUDGET PROVISION

INTERMEDIATE SCHOOL PLANNING AREA NO. VII

SCHOOL	APPROPRIATION	PURPOSE
I.S.302	$4.3 Million	Add.Cap.
I.S.363	4.3 Million	Add.Cap.
I.S.326	a	Add.Cap.
I.S.366	b	Add.Cap.

* C-Construction a-Planning b-Site Acquisition LR-Long Range Program

EXHIBIT B

Nº 7804

The University of the State of New York

The State Department of Education

Before the Commissioner

IN THE MATTER

of the

Appeal of MILTON A. GALAMISON, THELMA HAMILTON, HELEN EFTHEN, CURTIS GRACE, et al. from continuing action of the Board of Education of the City of New York in refusing to institute an education park in East Brooklyn.

John E. Silverberg, Esq...............Attorney for Appellants

Hon. J. Lee Rankin.................Attorney for Respondent
Corporation Counsel
John J. Loflin, Esq., of Counsel

Robert L. Carter and Lewis M. Steel, Esqs.................
...................................Attorneys for N.A.A.C.P., amicus curiae

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On May 20, 1966, petitioners requested an order staying the construction of four elementary and three intermediate schools in the East Central Brooklyn area of the school district of the City of New York, and asked me to direct the respondent Board of Education to develop an educational park in this area. Following oral argument, a stay order was issued on June 24, 1966, and following a further hearing on the merits a decision was rendered on September 30, 1966, remanding the matter back to the Board for further study and consideration. In accordance therewith a report was submitted to me by the Board proposing a new school development plan in the East Central Brooklyn area, known as the Linear City Plan. Opportunity for a third oral argument was provided on March 14, 1967, after which further papers were submitted, including a request by appellants for another hearing on the additional matters presented.

In the meantime, the stay order has continued in force and no new schools have been started in this area. The need for such new schools continues to grow. Hence, although I am unable to dispose of all matters at this time in this complex case, I deem it necessary to issue this interim decision in order that plans now pending may proceed without further delay. Opportunity for oral argument on the remaining issues in the appellants' petition will be provided as soon as possible.

It has been the position of the appellants from the beginning of these proceedings that the development of an educational park is the solution to the problem of racial imbalance in the schools of East Central Brooklyn (Brownsville, Canarsie, Midwood-Flatlands, Flatbush-East Flatbush, and East New York). This was the basis of their original appeal from the Board's construction plans in which they asked me to stay the construction of I.S. 326-K, I.S. 363-K, I.S. 366-K, P-327-K, P-245-K, P-301-K and P-347-K. Appellants desire that the capital funds allocated by the City for these schools be used for an educational park to be located in the Brownsville area.

After examining the materials submitted by all parties involved, I cannot accept petitioners' position that an educational park is the only reasonable solution to the problem of East Central Brooklyn. At the same time, I share the petitioners' concern to see that the respondent board of education does not use badly needed capital funds to construct school buildings which will necessarily be de facto segregated.

Given the realities of the racial situation in East Central Brooklyn, it is not so apparent to me, however, as it seems to be to the appellants, that the development of an educational park in the Brownsville area would, in and of itself, necessarily alleviate this problem of racial imbalance, at least not on a long-term basis. A broader approach to the problem is required.

As indicated above, in its most recent answers to appellants' petition, the board of education has indicated a willingness to revise its original building layout for East Central Brooklyn and has submitted a proposal, advanced by the Corde Corporation, to develop a linear educational system, as a part of a broader urban renewal plan for the area. The Linear City plan, which, I understand, has been adopted by the City Administration, conceives of the creation of an entirely new community constructed along a six-mile section of the spine of the proposed Cross-Brooklyn Expressway between Brooklyn College and the intersection of Linden Boulevard and Junius Street. Included in the Linear City will be a variety of imaginatively designed residential, commercial, industrial, recreational and cultural facilities. As an integral part of Linear City, the Board of Education proposes to build a new educational system to serve a large part of the East Central Brooklyn area which is to be planned from the beginning, in cooperation with other units of government, private enterprise and area residents, as an experimental and semi-autonomous system, embracing the full range of educational experience from early childhood to adult programs.

After considering the Linear City proposal, I have concluded that the advantages it offers are of sufficient merit, in comparison with those offered by the other plans that have been presented for my consideration in this appeal, as to require my approval and support. Consequently,

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED BELOW.

IT IS ORDERED that the Stay Order heretofore issued on June 24, 1966, be, and the same hereby is, amended as follows, and that, except as amended, the same be, and same hereby is, continued in all other respects:

1. With regard to schools intended to serve the Brownsville, Midwood-Flatlands, Canarsie and Flatbush-East Flatbush communities, the board of education will proceed forthwith with the planning and development of Linear City. The following schedule is to be

maintained with progress reports to be submitted on the dates indicated:

August 31, 1968-Completion of recommendations for overall design of Linear City, site selection of all educational components, preliminary architectural design of specific educational components, and preliminary description of educational system (progress report to be filed on or before February 1, 1968);

January 1, 1969-Report of formal approval by all necessary government agencies of basic design concepts and site selection for the educational system together with a report of consultations held with relevant community groups in connection therewith;

January 1, 1970-Completion of final physical design of all educational components as related to approved sites and recommended organizational structure of educational system (progress report to be submitted on or before July 1, 1969);

July 1, 1970-Report of formal approval by all government agencies of final designs and organizational structure together with a report of consultations held with relevant community groups in connection therewith;

September 1, 1972-Completion of construction of all educational components and organization of educational system, including recruitment of staff, assignment of children, etc. (progress reports to be filed on or before January 1, 1971, and September 1, 1971).

The foregoing schedule may be amended only upon written request to the Commissioner on 30 days' notice to appellants.

2. a. No new school is to be constructed in the East Central Brooklyn area for which the expected enrollment of Negro and Puerto Rican children shall substantially exceed 40 per cent for elementary schools and 30 per cent for intermediate schools or junior high schools, unless the board, on notice to the appellants, can show that special circumstances exist in a particular instance. (The 1965 enrollment figures for the public schools in the Brownsville, Midwood-Flatlands, Canarsie, and Flatbush-East Flatbush sections indicated these overall percentages of Negro and Puerto Rican pupils.) For this reason, and because of the existence of many schools in the area enrolling such pupils far in excess of these averages, I am of the opinion that the Board should not commence any new school construction if the percentage of attendance of Negro and Puerto Rican children is expected to be substantially in excess of these averages in the four areas involved.

b. With regard to schools intended to serve the East New York and Spring Creek communities, the Board of Education is expected to proceed forthwith with the planning and development of an educational park in the Spring Creek section. Detailed plans for the location of the educational park and a development schedule are to be submitted on or before December 1, 1967. I. S. 366 is hereby released from the provisions of my earlier order, conditioned upon the anticipated use of this building as an integral part of such park designed for the purpose of reducing racial imbalance in that area.

c. I. S. 363 is hereby released from the June 1966 Stay Order. This is done upon the anticipated use of such building as an integral part of the Linear City Project.

IT IS FURTHER ORDERED that jurisdiction in this matter be, and the same is, retained pending my further order.

IN WITNESS WHEREOF, I, James E. Allen, Jr., Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 24th day of August, 1967.

SEAL

James E. Allen Jr.

Commissioner of Education

Galamison Schml

DRAFT July 8, 1966

PART II

THE FEASIBILITY OF EDUCATIONAL PARKS IN THE EAST BROOKLYN AREA

A. Statement of the Relationship of the Educational Park Concept to the Instant Proceedings.

In the present proceeding, the petitioners seek to restrain the construction of designated schools that will be segregated and/or racially imbalanced, and instead propose to the Commissioner of Education the construction of an Educational Park in the East Brooklyn section of New York City. The initial section of this brief dwelled at length with the issue of the prospective construction of segregated schools, and we submit as affirmatively demonstrated that such schools will be segregated and, therefore, unlawful. As a further ramification of this proceeding, we advance the proposition that it is incumbent upon the Board of Education of the City of New York to explore the construction of educational parks in the East Brooklyn Section of New York City, and failing such action by the Board of Education of the City of New York, we recommend that the Commissioner of Education undertake that function.

The petition and appeal of Milton A. Galamison, et al. states, unequivocally, in Section8, Page 11 through 18, that in the judgment of the petitioners, the Educational Park in New York City is a feasible alternative to the construction of segregated schools. The petitioners quote at length from "The Educational Park in New York City", a brochure issued by the Board of Education of the City of New York in April 1965, setting forth in broad terms the findings of the Board's study, with particular attention to the East Brooklyn Area and the reasons for the selection of that site. The petitioners further show, particularly on page 15, the adverous efforts of the Board to "work considerable financial sabotage to the subject of the above-quoted study". Thus, it follows that in the instant proceeding we have juxtapositioning of twin problems. On the one hand, as indicated in Section I of the brief, the evils and illegality of prospective construction of segregated schools. On the other hand, we have a demonstration in the first instance by the study of the Board of Education of the City of New York as recited in the petition herein, the feasibility of a reasonable alternative to meet the problems of segregation, and simultaneously make available to the community as a whole quality education. It is our purpose in this section of the brief to explore in further detail the consensus of professional judgment with respect to the feasibility of educational parks.

REVIEW OF THE HISTORY OF THE EDUCATIONAL PARK CONCEPT IN THE EAST BROOKLYN AREA

On July 15, 1964 community representatives in the East Brooklyn area submitted a proposal to the Board of Education setting down a brief outline of possible desirability of an educational park for that area. On January 8, 1965, a more comprehensive proposal was submitted. The latter proposal gave particular attention to the ethnic composition of the four principal sub-areas, i.e., Brownsville, East Flatbush, Canarsie and East New York.

The proposal identified approximately 96 acres of land, otherwise described as the "Flatland Side" , which was shown to be central to the four communities, and available by existing rapid transportation.

The proposal suggested an immediate shift of construction funds for the purpose of building P.S. 332 (Brownville), P.S. 345 (East New York), P.S. 245 (Brownsville) and J. 326 (Canarsie) on the "Flatland Site" as the beginnings of the educational park.

It is respectfully submitted that the foregoing proposal made available to the Board of Education, a community supported concept that had the dual objective of responding to the evil of prospective segregated schools and offering a feasible alternative that would make quality education a reality for all members of the community. This view of the choices thus available to the Board of Education are best summarized by William L. Hoffmann, President of the Board of Education of East Orange, New Jersey:

> "It boiled down to a matter of plodding along in the same old ad-and-patch grove, or daring to think creatively in an effort to develop a plan that would meet the realities of educating our children with the complexities of life in the nuclear-space age."

The origin and impetous for the above proposals sprang from many sources. The most striking was the position paper presented by Dr. Max Wolff on July 8, 1963 to Dr. Calvin Gross. Dr. Gross responded by directing members of his staff to study the concepts of an educational park. Thus, there was a joinder on the issue posed by Dr. Wolff as stated in his subsequent letter of August 19, 1963:

> "Integration can be presented as and should be part of a broader program of public education. For precisely this reason, the educational park is a promising approach to this complicated issue; others can be found and must be tested."

The interest in the educational park concept has not been limited to New York, but is being explored in many other communities throughout the country, as will be shown hereafter. Such interest arises for the reasons present in the instant proceeding. However, the interest very often flows from the effort to apply the technology and innovations of industrial parks (~~2~~) and shopping centers to the field of mass education.

The report of State Commissioner Allen's Advisory Committee on Human Relations and Community Tensions on May 12, 1964 entitled "Desegregating the Public Schools of New York City" contains an expression of view on the matter of educational parks:

> "We recommend further that, as soon as possible, the middle schools should be located in educational parks so situated as to provide children in as many parts of the City as is feasible the experience of attending a genuinely integrated school during their middle school year."
>
> "The most practical location for such schools would be in areas where a suitable number of minority group children can be drawn from existing ghetto neighborhoods into parks which will also enroll children from white neighborhoods."

As the brochure of the Board of Education indicates, on July 23rd and 24th, 1964, the first full-dressed discussion of the educational-park concept was held at Arden House, Harriman, New York. The participants included a substantial number of the members and staff of the Board of Education, entitled "An Exploration of the Educational Park Concept". Attending the conference from the Board of Education were the following: Mr. Adrian Blumenfeld, Administrator of School Planning and Research, Board of Education; Honorable Aaron Brown, Member, Board of Education; Hon. Thomas C. Burke, Member, Board of Education; Dr. Bernard E. Donovan, Executive Deputy Superintendent, Board of Education; Hon. Lloyd Garrison, Member, Board of Education; Hon. Alfred A. Giardino, Member, Board of Education; Dr. Calvin Gross, Superintendent of Schools, New York City Public Schools; Dr. Frederick Hill, Deputy Superintendent, Board of Education; Mr. Eugene Hult, Superintendent of Design, Construction and Physical

Plant, Board of Education; Dr. Nathan Jacobson, Special Assistant to the Superintendent of Schools, Board of Education; Mr. Jerome Kovalcik, Assistant Superintendent, Board of Education; Mr. Jacob Landers, Assistant Superintendent, Board of Education; Dr. Edward Lewis, Consultant, Board of Education; Dr. Joseph Loretan, Deputy Superintendent, Board of Education; Dr. Morris Sachs, Director of Planning, Board of Education; Mr. Hillery C. Thorne, Acting Director of Central Zoning Unit, Board of Education; Mr. Frederick Williams, Director of Human Relations, Board of Education. The cast of representatives of the Board of Education of the City of New York is indeed impressive, and indicates a substantial segment of the official administrative body of the Board of Education undertook a role in the discussion of "Should there be educational parks and "How to implement the concept?"

The summary presented by Cyril G. Sargent suggests that in June 1964, less than one year after the submission of Dr. Wolff's position paper to the Board of Education, sufficient study had occurred to permit these leading figures in the educational field to permit the following conclusions to be drawn:

> " * * * * *The question of whether of not New York should embark on a program of an education park or parks seemed to me to remain somewhat unresolved, at least as far as a consensus ;by the group was concerned. But I would sense that the preponderance of opnion favored their development, at least on an experimental or prototype basis. In support of this position the point was made that the N.Y.C. Board of Education is committed to quality education, and to the proposition that quality democratic education is integrated education, it therefore follows that while no one plan or proposal would solve all the integration problems the education park is a techique which 'could strike a mortal blow at segretated schools.' Expressed another way, one speaker said that 'without such centers it is impossible to get

very far with integration, and integration is the overriding social issue of the day.' However, it was pointed out that there were alternatives and that in the search for quality education, the massive undertaking involved in developing an education park should not lead us to neglect a sustained drive on other ways of moving forward toward this quality.

In this same vein, there were those who feld that if the park was to be a useful educational device for 'holding the community' it must be shown that it could provide an education such that the parents of children involved would want their children to go because they could get a quality of programs and services generally not provided in other patterns of school organization. 'If it is just bigness, it will fail; only if it is better will it survive.'

Some of the possible unique qualities which were suggested from time to time during our discussion were said to consist of:

1. An opportunity to select a park as a part of a college or university complex so that it could be made part of both the instruction and research of the college. The level of instruction, the subject matter content and the experimentaion and research would all create a climate of excellence and superior performance on the part of both teachers and pupils which would not prevail elsewhere. The analogy was drawn to the research hospitals in their communities.

2. An opportunity to break away from exising restrictions of program and organization in a new setting. Innovations would be as it were easier to come by.

3. An institutional setting in which the teachers' status and self image could be improved.

4. A situation in which large numbers of pupils would justify special facilities and opportunities for special programs not otherwise economically feasible. Theatres, wuality libraries, and museums were mentioned as a few of the possibilities. Similarly, special services and compensatory activities could be made more generally available. Broader teacher competence and experience could be available and the center could serve as a catalytic and revitalizing force for adult citizens as well, affecting adult thinking on community problems and needs."

We must emphasize that these conclusions were advanced to reflect a consensus of view involving a substantial body of

~~pres px~~ representatives of the public educational establishment in New York City.

In April of the following year, as previously indicated in this section, the Board of Education of the City of New York issued a brochure entitled "The Educational Park in New York City". The brochure indicates significant study of the concept and a commitment to experiment within the City of New York. Attention must also be directed to the fact that the Board of Education recognized its dual obligation to develop programs to improve integration and improve education.

On page 5 of the brochure, attention is given to the East Brooklyn Area:

> "The site which seems to meet best the criteria which have been established is located in Brooklyn, between East 100th Street and East 107th Street, and between Farragut Road and Avenue D (see Exhibit A). It is situated adjacent to four rather well-defined neighborhoods-Brownville, Canarsie, East Flatbush and East New York."

These views are also contained on page 11 of the instant petition in Section No. 8. That Section offers additional quotations from page 5 of the Board of Education's brochure with particular attention to certain criteria employed by the Board in establishing the feasibility of educational parks in the East Brooklyn area.

The expected and logical objective of the foregoing developments were never reached. On September 23rd, 1965, The Board of Education of the City of New York informed the people that sites had been selected for the application of the concept of an educational park that were worthy of experimentation - at two locations, Co-op City (Bronx) and Kingsbridge (Bronx-Manhattan). The statement of President Lloyd K. Garrison, released to the public on September 23, 1965 stated:

> "If the experiment with the educational park is successful, the concept will be expanded to other areas of the City. Among these would be the East New York-Brownsville-Canarsie area. We are requesting the Board of Estimate, in its consideration of the industrial park for this area, to be aware of the fact that it is a logical area for the extension of the educational park concept. In any action they may take on the proposed industrial park, we are requesting that they include consideration of a section of that area or a suitable area immediately adjacent to it for retention as a possible educational park."

It therefore developed that after more than two years of ~~when~~ conferences, studies and other efforts to evaluate the educational park had occurred involving the principal figures of the Board of Education of the City of New York, that the Board had determined to abandon its earlier willingness to apply the concept in East Brooklyn— but most significantly, it withdrew to the earlier technique of adopting the prospective construction of segregated schools.

Certain observations arein order to focus attention on the locations actually adopted by the Board of Education. In some measure, these locations reveal that the Board has failed in at least one significant respect at the selection of locations, i.e., they were not designed to and will not, in fact, reduce segregation in the school system of the City of New York. More importantly, the failure of the Board to experiment in the ~~Axx~~ East Brooklyn Area, in an area where the educational park concept would have lent~~xx~~ significantly to the improvement of integration, the Board has, in fact, moved in the very opposite direction. A recent statement by Dr. Max Wolff before the Board of Education on June 16th, 1965, offers eloquent commentary on the defects of the Kingsbridge and Co-op City plans:

> "The other two proposals in the booklet do not meet the criteria. The Kingsbridge plan does not fit ~~xxxx~~ into a possible master-plan for ~~dxxxgxxx~~

> desegregation. Although children can be brought up for Harlem to desegregate the proposed park, the existence of this park will preclude a more far-reaching solution of Harlem segregation. Specifically, it will draw away the white population now at George Washington High School and will prevent the development of a unified plan for the upper districts of Harlem, Riverdale and Inwood along the lines suggested by the Local School Board at the middle school level. It requires in proportionate long travel for the Harlem children and little or none for the residents of the Marble Hill and Riverdale. It has no real possibility of expansion or of rationalization of plant usage as discussed earlier.
>
> The Coop City pyramid organization suffers some of the same disabilities, although it could be integrated by drawing children from the small minority group that will be in Coop City itself and that resides in the north Bronx, it serves as a block to the desegregation of the Morrisania and other central Bronx areas of minority group concentration. If these children were to be drawn into the park, they would have to travel a very long distance and leap=frog over the Coop City itself to get to the Park. It would seem much more desirable to establish a Park between the two ethnic communities in Central Bronx to draw equally from the Coop City area and the minority group area for a more stable and dquitable solution. Here a start could be made with existing facilities and room for expansion at a later date can be found."

By contrast, in the same statement, Dr. Wolff, beginning on page 13, offers certain criteria that bear upon the selection of the East Brooklyn location for an educational park and concludes:

> "Judged by these four criteria, the East Brooklyn educational park is an excellent choice. It readily fits in to a City-wide plan for school desegregation since it is a self-contained area that brings togehher several ethnically and economically disparried (?) communities; if the segregated schools in the East New York area are included in the plan as suggested in the text, ~~but~~ though not in the table of schools listed in the booklet, it will not leave any segregated school out in the cold and permanently by-passed; it is equally accessible to all the communities that will serve, with no racial disparity in travel time; it can be expanded readily

and it already has developed transportation facilities."

WHAT THE EXPERTS SAY, AND WHAT OTHER COMMUNITIES ARE DOING ABOUT THE EDUCATIONAL PARK CONCEPT.

The concept of educational parks, not only received significant attention in the Allen Report on de-facto segregation in New York, but has received extensive comment by others. John Fisher, President of Teachers College, Columbia University, has described the educational park as doing to the urban community what the consolidated school did for rural communities. Professor Robert A. Dentler has offered extensive commentary on the utility and advantages of the educational park, otherwise described by him as an educational complex. He has commented favorably on the high standards and expectations that can be set up for the complex as a unit because of the fluidity and the interchange of specialists, educational aids and special services within a complex. He speaks about remedial reading aid, science laboratories and special language programs that can be shared by all students attending a given school complex.

Others have commented on the availability of federal programs and services drawing particular attention to language, science, reading, advisors, health psychiatric and psychological services, kitchens, cafeterias, television, radio and audio-equipment, curriculum material for disadvantageous children, program instructors, school-job coordinators, educational laboratories, guidance counseling and testing aid, improved vocational education, public libraries, community mental health centers, teacher-training programs, research for the physically handicapped, and most particularly the use of urban renewal funds for school site selection and site development.

In East Orange, New Jersey, an education plaza has been conceived and planned. The plaza includes primary schools, grades K to 4, the middle school, grades 5 to 8, the high school, grades 9 to 12, a resource tower, a gymnasium, a lively arts center, a stadium and substantial parking space, together with sufficient land for future expansion. Potential enrollment statistics indicated a student body of approximately 10,000. East Orange, although a compact city of just under four square miles, outside the metropolitan New York area, has a population of just under 100,000 people. In some respects, it is similar to the East Brooklyn area with one significant ~~expan~~ difference -- East Orange is planning for the future. The Board of Education in East Brooklyn is planning for the past. A number of experts have commented on the educational park or plaza concept as conceived in East Orange:

> "The educational park or plaza concept is one of the striking new ideas for the improvement of city education. It provides for efficient use of a modern educational plant. At the same time it brings together the children of the various groups that make up the American society and gives them a good chance to learn the ways of a pluralistic democracy."
>
> Robert J. Havighurst, Professor of Education,
> University of Chidago.

> "The East Orange Education Plaza is one of the most exciting proposals that I have ever helped investigate. The country needs a center where proven educational techniques and devices can be brought together . . .this project could well be a pilot program for America's cities."
>
> John J. O'Neill, Dean, Graduate School of
> Education, Rutgers, the State University.

> "It takes courage to embark upon a program of this sort, and I am excited at the possibilities and

thought given to this project by the East Orange Board of Education. There will be problems, but there are problems connected with all building. I see no reason why this concept should not become a reality. It depends on how much the people associated with it believe in it."

John Rowlett, A.I.A., Caudill,
Rowlett, and Scott.

"As ournation doubles in population, schools will necessarily be larger than in the old days we have known. Indeed, the consolidation of schools is going on all over the country, providing greater efficiency, more and better services by virtue of their centralization. It is a movement that should be encouraged."

Harold B. Gores, President, Educational
Facilities Laboratores, Inc.

"Schools must graduate individuals who are flexible or else our society will be too rigid to deal with the future. The way we do this is through a flexible program in a flexible operation. This school will educate youngsters for jobs which do not exist and for professions which cannot be described. This concept should do it."

B. Frank Brown, Principal, Melbourne
High School, Melbourne, Florida.

"It is going to take a bold approach if some of our school systems are to be saved. We do not have a lot of time to make up our minds how we are going to save them because time is running out. Mobility within the city is a problem. The idea that we might continue to patch up the existing system actuall does not work out becase you don't know where your children are going to be from one year to the next. You can renovate a school and find out that your children are on the other side of town. A central school would relieve this very difficult problem."

William S. Twichell, Essex County
Superintendent of Schools.

"The United States Office of Education appreciates the opportunity to be a part of this exciting plan, and we will do what we can tohelp you make it a reality."

John L. Cameron, Chief, School Housing
Section, U.S. Office of Education.

In addition to the experts in the educational field, architects and others have ventured professional comments on the feasibility of educational parks. Mr. Leo Berman of the American

Institute of Architects has stated the following in the Architectural Record, February of 1966:

> "For architects, this educational park concept offers an unparalleled opportunity. They must apply the best elements of school design already in existence, and spare no effort to make the educational park the most imaginative and efficient environment for learning and teaching."
>
> " * * * * *The central facilities which form the core of the educational park might be grouped around an open space which would then become a neighborhood square and park, active both day and night. Dances, club meetings, athletic events, adult education, community meetings, all would contribute to a close relationship between school and community. In the amorphous landscape of most of our metropolitan areas it will act as a visual focal point for the whole district. The impact of such a symbol on the surrounding areas might be significant, helping stabilize the neighborhood, encouraging new housing, and providing a stable anchor for community life."

These are the experts who have spoken on a relatively new concept. We are not suggesting that the concept is fixed and final forever; nor are we suggesting that all the rinkles have been worked out, and no problems will emerge. Our concern in the instant proceeding, quite simply stated, is that the Board of Education of The City of New York, the Allen Report, those experts that are available and have addreseed themselves to the concept, have all taken the view that an educational park is feasible and desirable and certainly worthy of experimentation. We agree with those conclusions and respectfully submit that such experimentation should occur in the East Brooklyn Area.

FEASIBILITY AND EXPERIMENTATION

Our society is indeed more complex, but our schools are not. For some strange reason in the City of New York our schools are falling behind in the quality of education they provide. We lack quality, we lack equality, and we certainly lack the intensive complex programs that are required in the present age. Most New York schools simply cannot afford to give children intensive science programs that require expensive laboratories and equipment. They cannot afford to provide language laboratories where children can learn a foreign language more effectively. They cannot afford well-equipped libraries or well-equipped audio-visual centers in closed circuit T.V. They cannot afford adequate teacher-training and student demonstrations. They cannot afford the creation of guidance centers or clinics for early diagnosis of ill children and the proper treatment. They cannot afford the highly specialized personnel needed for the proper instruction of children in the type of mathematics so necessary today to cope with scientic advances, and obviously, above all they cannot afford the kind of athletic centers, gymnasiums, swimming pools and so on, that children must have to develope physical fitness so necessary to the health of the individual and the community. It is all of these things that the Board of Education of the City of New York cannot provide to the city children that an educational park provides at the same economy at the same cost. The educational park provides the opportunity for several schools to pool their resources and to have maximum utilization of common facilities, common teaching staffs, common equipment, common teaching aids and, of course, all the modern, complex equipment that may be required. An educational park is a very simple idea; it merely involves the construction of several schools and school facilities in one area, preferably in a park-like setting such as a college campus. It can consist of several primary schools, middle schools and high schools, or it can consist of a combination. The essential feature is that it provides a cluster of school buildings that use common school facilities. It does not have to be all at once; it can be small beginnings --two or three schools at a time, with the anticipated master plan providing for an ultimate total plan to the entire area.

In the context of the instant proceeding, the educational park would draw its student body from a large community, and thus provide a better racial balance within its classrooms. It would, therefore, have a significant function in breaking the pattern of segregated schools that exist in the East Brooklyn area, particularly at a time when the Board of Education of the City of New York proposes the construction of further segregated schools in that area.

It is certainly well and good for the experts, ourselves included on a more modest scale, to offer glowing objectives for an educational park. However, we must come back to reality; we must look at Canarsie as well as Brownsville. If we do that, we are particularly alarmed by the posture and plans of the Board of Education of the City of New York. The children we speak of in Canarsie and Brownsville live in crowded, ugly, poorly-serviced lands and communities. There is no beauty, there is no space, there is no culture, social or recreational activities; there is no adult education, no job training center. Community facilities of any kind or description are lacking. Shopping facilities are inadequate. The purpose of the educational park would not be simply to integrate these communities with other communities, nor would it be simply to create the objectives we spoke of above, but in great measure it would an effort to expose the young children of these communities to another way of life. This is not pie in the sky, it is something very real; for the Board of

Education has the authority, has the money and previously had the intention of building an educational park in East Brooklyn.

We respectfully submit that the Board of Education has forfeited its responsibility to do the above, and we respectfully request that the Commissioner of Education now assume that responsibility and conduct the necessary study at this time to determine the ~~immed~~ immediate feasibility and site selection for an educational park in the East Brooklyn area.

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

- X

In the Matter of the Appeal of :

MILTON A. GALAMISON, THELMA HAMILTON, :
HELEN EFTHIM, CURTIS GRACE, et al.,
:
From the continuing action of the Board
of Education of the City of New York in :
refusing to institute an education park
in East Brooklyn, etc. :

- X

PETITIONERS' BRIEF

THE FACTS

1. The Junior High Schools of East Brooklyn Are Imbalanced.

Seven of the eight existing junior high schools eliminated by petitioners' plan as set forth in the Efthim affidavit of July 11, 1966 are segregated or imbalanced.

The latest ethnic statistics for these schools appear in Exhibit B of the Landers affidavit of June 20, 1966.

A segregated school is defined on page 2 of the Allen Report, Exhibit B to the petition herein. An imbalanced school is defined by the ethnic and racial composition map which forms a part of the Allen Report, Exhibit D to the petition herein. These definitions might well be considered unduly restrictive since Table 3a. to the Stein affidavit shows that the latest statistics for Brooklyn reveal a total of 44% "Other." In other words, imbalance in this area could be defined as when one group constitutes more than 60% of the total. This would be well within the criteria used by the Commissioner in soliciting ethnic statistics by his memorandum of June 14, 1963, and is in conformity with the statement of Guiding Principles for Dealing with De Facto Segregation in Public Schools of the State Education Commissioner's Advisory Committee on Human Relations and Community Tensions:

> "A cardinal principle, therefore, in the effective desegregation of a public school system is that all of the schools which comprise that system should have an equitable distribution of the various ethnic and cultural groups in the municipality or the school district. Where serious imbalance exists the school with the highest proportion of minority group and lower-status children tends to receive more such children as parents who are able to do so move to neighborhoods and schools of higher status."

The subject schools in the Efthim affidavit of July 11, 1966 are:

J-68	White imbalanced
J-211	White imbalanced
J-252	Negro-Puerto Rican imbalanced

J-263 Negro-Puerto Rican type - segregated
J-275 Negro-Puerto Rican - imbalanced
J-285 white - imbalanced
(second stage)
J-149 Negro-Puerto Rican type - segregated.

It has been amply demonstrated by the record that segregation and imbalance exist in the junior high schools of East Brooklyn.

2. The Local Authorities Have A Desegregation Plan.

The respondent Board in April 1965, developed and knew of the existence of a feasible, realistic skeleton plan to eliminate six of the seven segregated or imbalanced junior high schools and desegregate and eliminate imbalance for all of their pupils by diverting current budget requests to such plan (pp. 11-15, petition plus Exhibit F to petition). The principal authors of this plan were Jacob Landers and Adrian Blumenfeld (Blumenfeld affidavit of June 20, 1966, p. 13). The plan was for an integrated education park at the Flatlands site. Exhibit F to the petition at p. 5 et seq. declares that the Flatlands site

> "... seems to meet best the criteria
> which have been established ..."

as to "A. Integration."
"B. Educational and Sociological Soundness."
"C. Land Availability."
"D. Flexibility."
"E. Economy."
"F. Stability."
"G. Transportation."
and "H. Proximity of Pupils."

3. Respondent Refuses to Implement Its Plan.

Without any valid reason appearing in the entire record of these proceedings, and on September 23, 1965, respondent Board abandoned its desegregation program for East Brooklyn, advising the City authorities that in designating land in the Flatlands area for industrial use and leasing same, the possibility of an education park in that vicinity many years hence should be considered. (See petition pp. 16-18 and exhibits to petition F and H.) Subsequently, and "since the end of 1965" (see Landers affidavit, p. 3) data became available to respondent Board which it asserts justifies its decision of September 23, 1965. That decision was finalized by its inclusion in the Capital Budget on April 20, 1966 (see petition p. 7 and Exhibit A thereto). The decision of September 23, 1965 was given more concrete form by the publication on September 29, 1965 by respondent Board of its 1966-1967 "adopted" school building program (see petition pp. 9-10 and Exhibit C thereto) requesting budget allocations for the seven schools stayed by these proceedings as well as I.S. 342 and 343 designated as "Brownsville Intermediate Schools," P. 346 designated for "new large-scale housing in East New York" and I.S. 361.

Subsequently, and "since the end of 1965" (see Landers affidavit p. 3), data became available to the respondent Board which it asserts justifies its decision of September 23, 1965 as well as its adopted school Building Program of September 29, 1965. The two Brownsville middle schools as well as P. 346, I.S. 361 and I.S. 366 were deleted by the Mayor and City Planning Commission (I.S. 366 finally being restored) with statements in official records critical of respondent Board both for its abandonment of the Flatlands Park and its inability to formulate desegregation plans (see petition pp. 18-23 and Exhibits I and J thereto).

4. The Abandoned Plan Achieved Maximum Desegregation.

The desegregation plan abandoned by respondent Board achieved a balance of 53% "Others" for a total of 9,563 pupils. This plan also converted six existing segregated and imbalanced junior high schools to other uses. (See p. 14 to petition and Exhibit F thereto.)

The plan offered to the Commissioner by the respondent Board achieves an imbalance of 73.8% "Others" in I.S. 363 and a balance of 67.5% "Others" in I.S. 326 with an unknown balance in I.S. 366 for a total of 5,400 pupils. (See Stein affidavit p. 11.) This plan would not desegregate or convert to other uses a single existing school.

The abandoned plan of the Board as revised by petitioners and based upon current statistics would initially achieve a balance of 51.3% "Others" for a total of 11,530 pupils while immediately converting six existing junior high schools that are segregated or imbalanced to other uses. This plan depends on the same budget allocations made for schools stayed by these proceedings (p. 3 Efthim affidavit of July 11, 1966). Petitioners plan also provides for additional desegregated facilities and conversion of segregated J. 149 (and its replacement under construction J. 292) to other use as additional funds become available.

5. Respondent's Refusal to Implement Its Plan Is Arbitrary.

Contentions of the respondent Board that it is necessary to proceed with the construction of primary schools that will admittedly be segregated and that data available to the Board "since the end of 1965" caused it to abandon its desegregation plan in September 1965 are dealt with at great length in the Stein affidavit as well as the Efthim affidavit of July 11, 1966 and the Commissioner is respectfully referred to those portions of the record to determine the reasonableness of the Board's refusal to fully develop and implement its skeleton plan of April 1965.

6. Respondent Board's Sole Desegregation Plan Is the One It Refuses to Implement.

Procedurally, respondent Board has interposed two affidavits in opposition to the stay application herein, which contain factual data concerning future plans for the seven stayed schools. Respondent Board has declined to inform the Commissioner of its future plans for desegregating the area, but instead refers to a "master plan" and policy statements from its "1967-1968 School Building Program" (Blumenfeld affidavit of June 20, 1966 pp. 6-8). The said "School Building Program," an exhibit to the Silverberg affidavit of June 20, 1966, however, shows that by 1973 the number of Brownsville primary schools will be doubled from 11 to 22 (see also Stein affidavit p. 13). Said exhibit also discloses that I.S. 342 and 343 previously designated for "Brownsville" will again be sought for budget allocations along with all other middle schools vaguely designated for "planning area VII." The skeleton desegregation plan of respondent Board, abandoned in September 1965, was far more specific and detailed than respondent's current mysterious "master plan."

7. The Rejected Plan, Locally Devised by Respondent, Was in Response to Administrative Guidance from the Regents, the Commissioner and His Advisory Council.

Respondent's skeleton desegregation plan (Exhibit F to petition herein) states on page 1 thereof that it received "fresh impetus" from the Allen Report and even quotes that seciton of the Allen Report dealing with education parks. (See p. 11 of the petition.) One might literally say that respondent's April 1965 plan, while not the result of any order from the Commissioner, was in direct response to a series of events commencing in Albany with the Regents Policy Statement of January 28, 1960 and the Allen memorandum of June 14, 1963 and culminating with the reaffirmation by the Regents of its January 28, 1960 statement, as of August 23, 1963, supporting the reasonable efforts of the Commissioner to implement that policy, and the Allen Report of May 1964. It is clear that the respondent Board's skeleton desegregation plan was in conformity with the often stated principle of the Regents and Commissioner, of local control and administration, of the State policy to eliminate imbalance to the extent feasible.

The refusal of respondent Board to develop and implement its plan, clearly on the record, is quite a different matter. Nevertheless, petitioners, as is their statutory right, have brought respondent's locally devised plan before the Commissioner and now seek an order directed to respondent Board to develop and implement its plan forthwith, while retaining State jurisdiction by means of an extended stay, State initiated local studies, additional orders and any other lawful means the Commissioner deems appropriate.

THE LAW

POINT I.

THE COMMISSIONER HAS UNDISPUTED AUTHORITY TO RETAIN JURISDICTION OVER THE SUBJECT MATTER AND PARTIES TO THIS APPEAL.

Section 207 of the Education Law vests the Board of Regents with "legislative functions concerning the educational system of the state." In addition, or as an adjunct to those functions, the statute says that this administrative body shall "determine its educational policies."

On January 28, 1960, a "Regents Statement on Intercultural Relations In Education" was issued by that body which said in part:

> Modern psychological knowledge indicates that schools enrolling students largely of homgeneous, ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education, and is wasteful of manpower and talent, whether this situation occurs by law or by fact."

The distinction, if any, between legislation and policy is unclear where the same body is empowered to proclaim both. Certainly whether we consider the above quoted statement a legislative finding of constitutional inequality or a policy view of the state education system, the power of the Commissioner to correct said inequality is beyond cavil.

The leading case of Matter of Appeal of Mitchell, et al. v. Board of Education of U.F.S.D. No. 12, etc., 2 Ed.Dept.Repts. 501 (1963) says:

> "Having concluded that racial imbalance exists in the Woodfield Road School, the question before me is whether under the circumstances present in the district, such imbalance constitutes a deprivation of equality of educational opportunity envisioned under the Education Law of New York State for the pupils compelled to attend that school. I find that it does."

Since that decision included a specific finding that "The educational standards at the Woodfield Road School are not below those of the other two elementary schools" the "circumstances present in the district" are not related to curriculum, achievement levels, or the like, but rather, are referrable to "the general comments and principles enunciated by the Advisory Committee." Those comments and principles are sufficiently broad to cover every school district in the State with the question: Are you balancing your student population as quickly as possible to the extent feasible, giving due consideration to other important educational criteria? The answer in Mitchell, supra, on the record was no. The clear implication of the decision is that the failure to correct correctable imbalance, as quickly as possible, is unconstitutional in New York State.

At the very least, such failure violates State law. Nor is it necessary that the local authorities' failure to correct imbalance be deemed arbitrary and unreasonable, see Mitchell, supra, determination no. (3) p. 503.

The Mitchell decision was annulled in part by Special Term, Vetere v. Allen, 41 Misc.2d 200, 245 N.Y.S.2d 682 (Sup.Ct. Albany Co. 1963). The Appellate Division reversed Special Term, Vetere v. Allen, 21 A.D.2d 561, 251 N.Y.S.2d 480 (App.Div. 3rd Dept. 1964), and was affirmed by the Court of Appeals in a per curiam opinion with two dissents, Vetere v. Allen, 15 N.Y.2d 259, 258 N.Y.S.2d 77 (1965). On October 11, 1965, certiorari was denied, Allen v. Hummel, 34 U.S. Law Week 3113, 3118 (Oct. 12, 1965). Another attack was made on the Mitchell decision in federal district court which also resulted in the authority of the Commissioner being upheld, Olson v. Board of Education of U.F.S.D. No. 12, Malverne, N.Y., 250 F.Supp. 1000 (1966). Petitioners do not agree with the Court in Olson, supra p. 1009, "that the Commissioner's action was based solely on expert opinion." Petitioners reiterate that

> "Here the Board of Regents under authority of Section 207 of the Education Law has declared racially imbalanced schools to be educationally inadequate. The Commissioner under sections 301 and 305 of the Education Law has implemented this policy by directing local boards to take steps to eliminate racial imbalance."
>
> Matter of Vetere v. Allen, 15 N.Y.2d 259, 267, 258 N.Y.S.2d 77, 80.

The Court of Appeals in Vetere, supra (p. 266 and 79), also lays bare the broad powers of the Commissioner:

> "'But in passing upon the propriety of educational policy by a particular school board or school district he acts in a broader capacity than the courts, by reviewing at times administrative acts of discretion of which a court would refuse to take cognizance.'"
> (Quoting an earlier case cited therein)

The Fact is that since Mitchell, supra, the Commissioner has consistently upheld the Board of Regents' policy in a series of appeals:

The Commissioner has denied a motion to reopen Mitchell, supra, while ordering the Board to submit its program in accordance with the order therein, Matter of Appeal of Mitchell v. Board of Education of U.F.S.D. No. 12, etc., 3 Ed.Dept.Repts. 260.

The Commissioner has ordered the Board of Education of the City School District of Buffalo to submit a "plan for the progessive elimination of racial imbalance" while "reserving the right to make such further order or orders in this case as shall be necessary to effectuate a plan approved by me." Matter of Appeal of Dixon, et al. v. Board of Education of the City School District of the City of Buffalo, etc., Decision No. 7470 (1965), cited by the Court of Appeals in Vetere, supra. On page 3 of the Dixon decision the Commissioner held:

> "I hold that in developing its pupil assignment policies and in planning for new selected buildings, it is incumbent upon a board of education to take into account the continued existence or potential creation of a school populated entirely or largely by Negro pupils."

After referring to the difficulties involved in correcting imbalance, the Dixon decision states:

> "Despite these difficulties, I am convinced that constructive steps can be taken to bring about substantial improvement in the situation and that the Board has not exhausted the possibilities for remedy. Furthermore, I am not satisfied that the Board has been sufficiently aggressive and determined in seeking a feasible plan of action.
>
> "This is a matter requiring strong leadership by the Board of Educaiton and it must accept responsibility for that leadership.
>
> "There are available to the Board, I am sure, in the City, particularly in its institutions of higher education, and in its staff, as well as elsewhere, technical and consultant resources capable of assisting the Board to devise and implement a feasible plan for eliminating racial imbalance and for raising the quality of learning opportunities for the pupils of Buffalo."

The Commissioner has dismissed an appeal seeking to compel a respondent board to let the voters reverse a board decision to bring Negro children into neighborhood schools to correct imbalance, Matter of Appeal of Hickey, Jr. et ano. v. Board of Education of Central School District No. 3, etc., Decision No. 7587 (1966).

The Commissioner has ordered the Board of Education of the City School District of the City of Mount Vernon to "proceed forthwith to implement the plan" devised by said Board for the creation of a centrally located "Children's Academy" to be attended "40 percent of the school day" by all the "children from the various elementary schools in the district," Matter of Appeal of King, et al. v. Bd. of Ed. of the City School District of the City of Mount Vernon, etc., Decision No. 7636, and the said Board was also ordered to issue "progress reports with respect to the plan" and "jurisdiction ... is retained." The decision of the Commissioner resulting in the submission of the Children's Academy Plan by local authorities contained the following paragraph:

> "While I am not unmindful of the various complexities here existing, I am not satisfied, however, that respondent has exhausted all avenues of approach to a correction of the difficulties existing in this respect, and it will therefore be necessary for respondent to formulate and submit to me a plan for the progressive reduction of the racial imbalance existing in this district to the fullest extent possible within sound educational principles, including the steps to be taken in this direction beginning with the school year 1966-67."
>
> Matter of Appeal of King, etc.,
> Decision No. 7579 (1965).

The Commissioner has ordered a board of education in Babylon to "proceed forthwith to implement its plan submitted in accordance with my previous order" and "submit progress reports with respect to the plan" and has retained jurisdiction "pending further order," Matter of Appeal of Bedford, etc., et al. v. Board of Education of U.F.S.D. No. 6, etc., Decision No. 7653 (1966).

The decision upon which the latest Bedford order was based contains a succinct statement of the present state of the law in New York State:

> "The events of the past decade have impressed upon me, as upon so many others, the necessity for abrogating allegiance to the concept that separate facilities, whether de jure or de facto, can actually be equal. As Brown (347 U.S. 482) reversed Plessy in the United States Supreme Court, so my decision in the Mitchell-Vetere case (supra) reversed Bell."
>
> * * *
>
> "In a later Brown case (349 U.S. 294, 300-301) the Court spoke of 'revision of ... attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis' as one of the means to meet the problems here involved. Noted also should be the statement of Judge Kaufman in Taylor v. Board of Education (191 F.Supp. 181, 187, 195 F.Supp. 231, aff'd 294 F.2d 36, cert. den. 368 U.S. 940."
>
> "'The Brown decision, in short, was a lesson in democracy, directed to the public at large and more particularly to those responsible for the operation of the schools. It imposed a legal and moral obligation upon officials who had created or maintained segregated schools to undo the damage which they had fostered.'"
>
> "As Chief Judge Zavatt pointed out in Blocker v. Board of Education, 226 F.Supp. 208, the Neighborhood School Policy is not immutable and that a board of education, by

> maintaining and perpetuating a de facto segregated school system transgresses the prohibitions of the Equal Protection Clause of the Fourteenth Amendment."
>
> Beford, etc., Decision No. 7580, pp. 2-4.

That decision further stated:

> "Respondent has stated that additional facilities will be needed to house the influx of additional pupils ... regardless of any problem of racial imbalance ....
>
> "In the provision of such additional facilities, the matter of racial imbalance and desegregation will need to be taken into consideration."
>
> Bedford, etc. (p. 6)

And finally:

> "One other contention of the respondent is that in-migration of Negroes into this district will, at some time in the future, result in percentages of colored students in excess of 50 per cent for the whole district. Unlike the present situation, however, that is a contingency beyond the control of the education system."
>
> Bedford, etc. (p. 7)

The Commissioner has ordered a Board of Education of Hempstead to "proceed forthwith to implement the plan submitted to me dated March 9, 1966" and also to issue "progress reports" and retained jurisdiction "pending further order" where the parties stipulated to an agreed plan. Matter of Appeal of Hall v. Bd. of Ed. of U.F.S.D. No. 9, etc., Decision No. 7646 (1966), and in another Hempstead case made the same rulings with the difference that "jurisdiction of this matter be, and the same hereby is, retained pending the implementation of said plan." Matter of Appeal of Bristow, et al. v. Bd. of Ed. of U.F.S.D. No. 8, etc., Decision No. 7647 (1966).

A similar order was issued in Matter of Appeal of Davis v. Bd. of Ed. of the City School District of the City of Glen Cove, etc., Decision No. 7648 (1966).

Those decisions and the cases cited therein provide overwhelming authority for State jurisdiction over the East Brooklyn section of New York City.

POINT II.

PETITIONERS HEREIN SUBMIT THE PLAN LOCALLY DEVISED BY RESPONDENT AS THE RESULT OF STUDIES CONDUCTED BY THE COMMISSIONER AT THE REQUEST OF RESPONDENT.

The Regents statement of January 28, 1960, in addition to declaring de facto segregated schools unequal as a matter of law, also declared:

> "All citizens have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child."

On June 14, 1963 Commissioner Allen issued a memorandum to "All Chief Local School Administrators and Presidents of Boards of Education" outlining the Regents position on racial imbalance, and requesting by September 1, 1963 a census report from each board on imbalanced schools, a statement of policy on imbalance, a progress report on eliminating imbalance "where it exists" and "your plan for further action."

On March 6, 1964 the Commissioner sent a "Summary of the Department's Position with respect to the Elimination of De Facto Segregation in the Schools" to the Legislature. That summary said among other things:

> "5. In keeping with the principle of local control, it is the responsibility of the local school authorities to develop and implement the necessary plans to eliminate de facto segregated schools. [Double underscoring supplied]
>
> "It is recognized that in some communities residential patterns and other factors may present serious obstacles to the attainment of racially balanced schools. This does not, however, relieve the school authorities of their responsibility for doing everything within their power, consistent with sound educational principles, to achieve equitable racial balance." (Underscoring supplied)
>
> * * *
>
> "While the public school authorities have a special responsibility for leadership in the elimination of *de facto* segregation, the problem is also the responsibility of every citizen — of government officials, civic leaders, leaders of ethnic and racial groups."

On August 23, 1963, the Regents issued its "Statement by New York State Board of Regents relating to Racial Imbalance in the Schools," reaffirming the statement of January 1960 and "strongly support Commissioner Allen's efforts to implement this policy through all reasonable means."

On March 20, 1964 the Regents came out in opposition to "certain bills before the Legislature which are intended to prohibit in one form or another the assignment of pupils to schools." The Regents went on to say:

> "The conditions resulting from *de facto* segregation and the racial imbalance it creates vary widely among the communities affected. The greatest possible flexibility of approach will be required to find solutions suited to the particular needs of each community. Those people in the community most intimately acquainted with the local situation are in the best position to devise solutions adapted to local needs. In dealing with this very complex and pressing problem, the local authorities should be free to consider all possible approaches. Hence, to pass legislation which would restrict their choices would seriously hamper local initiative and determination."

On February 7, 1964, the President of respondent Board and Superintendent of its schools wired the Commissioner requesting that he "set up procedures for evaluating" the Board's integration program. The Commissioner responded with a letter informing the Board that the Committee consisting of Dr. John H. Fischer, Dr. Judah Cahn and Dr. Kenneth Clark would evaluate "the Board's plan as you have requested." Subsequently, the Allen Report was issued dealing specifically with New York City. The Allen Report discussed all the issues involved in this Appeal and it is submitted that the Board's April 1965 Plan for a Flatlands site was a direct response to the Allen Report and in marked conformity with the recommendations of the Allen Report. Procedurally, therefore, petitioners conclude that their appeal has reached that stage where a plan has been devised by the professional staff of the local authorities and brought before the Commissioner by local citizens, and parents with the broadest kind of community support, seeking an order to compel implementation at the earliest practicable date. The record in these proceedings also demonstrates the necessity for retaining jurisdiction by means of extending the existing stay order, State initiated studies, progress reports and further orders, reserving to the Commissioner the right to resolve such disputes as may arise between the respondent, petitioners and *amici* as was done in the *King* case, *supra*.

POINT III.

THE COMMISSIONER MAY TAKE JUDICIAL NOTICE OF RESPONDENT'S PAST FAILURES.

The various documents and records pertaining to respondent Board on file with the State Department of Education may form a part of the record of this case since the

Commissioner may take judicial notice of the records of his own department. Matter of Appeal of Butler, 3 State Dept. Repts. (official) 509, 511 (1914). See also, Board of Regents Regulations 8 NYCRR 276.14:

> "Records and reports. The Commissioner of Education will, in his discretion, in the determination of an appeal, take into consideration any official records or reports on file in the Education Department and relating to the issues involved in such appeal."

By this, petitioners suggest that there may be records in the Department showing the degree of respondent's compliance with the recommendations contained in the Allen Report aside from the charges made by petitioners and the self-serving statements of respondent. In this regard, the unsubstantiated charges of appellant in Matter of Paul B. Zuber v. Board of Education of theCity of New York, 3 Ed. Dept. Repts. 190, are of interest, since at that time (June 15, 1964) respondent apparently had advised the Commissioner that it was "prepared to implement [the Allen Report] in a substantial manner."

POINT IV.

WHILE LOCAL AUTHORITY SHOULD ORDINARILY ENJOY BROAD DISCRETION, THERE ARE LIMITS TO SAME.

It is clear, from the long line of decisions beginning with Mitchell-Vetere, supra, that without any finding of abuse of discretion or unreasonableness, the Commissioner may both review the locality's acts of discretion and retain state jurisdiction in a judicial proceeding in order to achieve state administrative objectives. Neither Mitchell, nor any of the recent desegregation appeals decided by the Commissioner, make a finding of arbitrariness. All, however, correctly assume that racial imbalance and segregation are indeed contrary to State law, where a feasible remedy exists. It is the refusal of the local authorities to boldly seize such a remedy and the appeal of a petitioner that causes the State to encroach upon the otherwise absolute power of the local authorities.

Since in the past, respondent's definition of desegregation of the New York City school system has included such trivial items as Negro and white pupils having breakfast together at a week-end conference, the Commissioner might well consider the necessity of calling limits to the "discretion" exercized by some local authorities in allegedly attempting to follow the guiding principles coming from Albany:

> "It will hardly be contended that the legislature meant to leave it to the board of education or trustees in each city or district having a special school act to place such construction as it would see fit upon this general law, and to suit its acts to its views of the meaning of the law, without affording a means of redress to persons differing with it in

> opinions and aggrieved by its acts. Such a view would result in as many different constructions of the meaning of this statute as there are different localities having special acts, and would defeat the purpose and intent of this general law."
> Matter of Appeal of Edson v. Bd. of Ed., etc., Jud. Decs. 1222, 1225 (1887).

With all our deference to local control, the fact remains that

> "The common school system of the state is a state and not a local system."
> Matter of Appeal of Flewellin et al. v. McLease, et al., Jud.Decs. 121, 124 (1897)

POINT V.

THE RELIEF SOUGHT HEREIN IS IN EVERY RESPECT REASONABLE AND WITHIN THE POWERS AND DUTIES OF THE COMMISSIONER.

A. Specific Remedies are Required Though Not Codified.

It was the opinion of Superintendent of Public Instruction, Andrew S. Draper, that:

> "It was impossible to provide by statute for all exigencies which might arise, and it was necessary to vest some discretion in the superintendent for the purpose of meeting these exceptional cases."
> Matter of Appeal of Cunliff et al. v. Wood et al., Jud.Decs. 771, 784 (1888).

The administrator, vested with judicial powers, as is the Commissioner, is really not restricted as to remedy, though the subject matter of his jurisdiction may be narrowly confined by statute. For example, the Commissioner unquestionably acts in a capacity beyond that of a court of equity:

> "There is a different relation between the Commissioner of Education and a proceeding before him from that which obtains between a court and a proceeding before it. A court is disinterested in all questions except the facts and the law. The Commissioner of Education is the administrative or supervisory officer of the whole educational system of the State. He is bound to have an interest in the equity, right and justice of all questions having a bearing upon the administration of the educational system. He must determine judicial questions with a view to the general effect upon the school system as well as to the technical requirements of the law."
>
> Election of Member of Board of Education U.F.S.D. No. 6, Jud.Decs. 175, 183 (1905).

Accordingly, policy statements are often found in appeal decisions:

> "This Department has adopted the policy of centralizing school interests and of eliminating smaller and less efficient schools in adjoining districts, etc."
>
> Matter of Appeal of School Districts, etc., 6 State Dept. Reps. 525, 529 (1915).

Nowhere, however, are the broad powers of the Commissioner so evident as in the orders he decrees pursuant to his judicial decisions:

> "There is a further reason for preferring the remedy by appeal to a common-law action. In an appeal the Superintendent can dispose of all questions connected with and arising therein in a single decision: Where the action of a decision of a school

> officer or the proceeding of a school meeting is wrong he can not only reverse it, but direct the appropriate remedy so as to afford redress to all persons who have been injuriously affected; while an action at law inures only to the benefit of the person who brings it, and only gives pecuniary damages, without substituting a correct proceeding in the place of an erroneous one." (Emphasis supplied)
> Matter of Appeal of Barnett v. Stanton, Ann.Rept.Dept.Instn. 1895, p. 184 (1894)

When the role of the Commissioner is thus fully comprehended, an order such as the order in the first Mitchell decision to reorganize the attendance areas of the district so that all pupils from kindergarten to grade 3 inclusive will attend either of two designated elementary schools and all pupils in grades 4 or 5 will attend a third designated elementary school, by a date certain, is not so startling. The decision in King, supra, to proceed forthwith to implement the plan for a "Children's Academy" is also fully authorized and consistent with the powers of the office of Commissioner.

The remedial power of the Commissioner has been codified in the Education Law. Petitioners call particular attention to Section 311(2) and (4) of the Education Law as well as Board of Regents Regulations 8 NYCRR 276.13 which imposes a duty upon the Commissioner to issue an order or direction in every case necessary and proper for giving effect to his decision.

B. Site Selection.

Generally speaking, the Commissioner is reluctant to usurp local authority on an issue of site selection. See *King*, *supra*. This is by no means a hard and fast rule, however, and should not be made into a fetish if that has the effect of denying equal educaiton as required by law. The Allen Report discussed the respondent's site selection policies and how they contribute to segregation and imbalance.

The traditional position of the office of Commissioner was set forth in the *Matter of Erecting a New School Building, etc.*, 12 State Dept.Repts. 412, 421:

> "On appeal cases where the Education Department has been required to review the action of the people of a district in selecting a site, the general policy has been established by a long line of decisions that the Commissioner of Education will not interfere with the action taken by the community unless it appears that the site selected is unsanitary, *so located as to impose hardships upon sections of the district, or so undesirable from every standpoint that a building should not be erected upon it.*" (Emphasis supplied)

Petitioners submit that this description suits the sites selected by respondent for the seven schools stayed by these proceedings.

The above cited case is of particular interest to petitioners since it parallels theirs in many respects. In that case all the parties stipulated the issues to be decided by the Commissioner. In the instant case, respondent was formerly desirous of having the Commissioner evaluate its plans although, admittedly, respondent now seeks absolute discretion to evaluate its own plans without interference by the Commissioner. The issues in Erecting a New School, etc. were:

> "1. Should a central school building be erected, or should two elementary school buildings be constructed in the more remote portions of the district in addition to the central school?"
>
> "2. Upon what site should the new building be erected?" (P. 418)

Commenting on these issues, the Commissioner held:

> "The maintenance of these separate schools will mean the maintenance of weak schools instead of one strong school." (P. 419)
>
> "The district has decided to erect the new building which is to cost $125,000 on the site now occupied by the present building. This site is undesirable in every particular. It would be a shameful proceeding for the people of the district to invest $125,000 of the people's money in a school building to be erected on a site of this character." (P. 420)

Since all the parties desired the Commissioner to recommend a site, he recommended the "Ackerman site" rejecting two other possibilities as "not accessible."

Petitioners would also inform respondent that their site selction temporary stay was by no means the first on record. See Matter of Rey, et al., etc., 1 Ed.Dept.Repts.

613, appeal dismissed on grounds that site selection was reasonable.

Furthermore, the courts, on constitutional grounds, have usurped the prerogatives of local authorities acting under their constitutional police powers to exclude churches from certain sites. See Matter of Diocese of Rochester v. Planning Board of Town of Brighton, et al., 1 N.Y.2d 508 (1956).

C. School Buildings.

The Commissioner has ordered an antiquated racially segregated school closed down upon finding that it had been zoned for the purpose of segregation. Matter of C.S.D. No. 1, etc., 65 State Dept. Repts. 106 (1943).

The Commissioner was upheld in his refusal to approve the consolidation of two school districts although the effect thereof was to delay construction of a high school which, if erected, might seriously have interfered with the district reorganization which he had under study. Peterson v. Allen, 170 N.Y.S.2d 91 (1957).

Several of the Commissioner's recent decisions on imbalance pinpoint the relationship of new construction to the problem. The Allen Report also calls for the elimination of segregated junior high schools in New York City.

D. A Bold Approach Is Needed to Desegregate the East Brooklyn Schools.

In his "Communication from the President of the University and Commissioner of Education - To the Members of the Board of Regents: August 26, 1965," the Commissioner discussed the twin problems of urban education and school desegregation:

> "... we have tragically failed in our efforts to provide equality of educational opportunity, and, because of this failure, millions of children throughout the nation have been, and are being deprived of one of the most fundamental and precious rights of their democratic heritage. The faults we seek to remedy are the result of the accumulation of long years of neglect--the neglect of prejudice and rank indifference, or of inadequate attention and support, or lack of foresight.
>
> * * *
>
> "The problems involved here are massive, and enormously complex and difficult of solution. They will not respond to piecemeal or limited remediation. The scope of the action must be geared to the size and urgency of the need." (Emphasis supplied)
> The University of the State of New York, Journal of Regents Meeting 8/26-27, 1965., p. 642.
>
> "Innovation.
>
> "The need for innovation is apparent in every facet of educaiton today. The resistance within the profession to the use of new methods and techniques is gradually disappearing, and the emphasis now

> needs to be not so much on selling the idea of innovation as upon its development and dissemination." (Underscoring supplied) P. 648.
>
> "... the one fact that clearly emerges is the need for massive bold solutions— the willingness to depart from tradition and to seize the opportunities created in this era of tremendous need and growing commitment. The needs are undeniable. The resources are more than adequate." P. 651.

CONCLUSION

THE COMMISSIONER HAS BOTH THE POWER AND DUTY TO COMPEL DESEGREGATION THROUGH THE EDUCATION PARK IN EAST BROOKLYN.

Respectfully submitted,

John E Silverberg

JOHN E. SILVERBERG
Attorney for Petitioners

STATE OF NEW YORK
DEPARTMENT OF EDUCATION
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In the Matter of the Appeal of

MILTON A. GALAMISON, THELMA HAMILTON, HELEN EFTHIM,
CURTIS GRACE, ELIZABETH GRACE, MARGUERITE GAITHER,
ANGEL RIVERA, ZEDIA HARRINGTON, WILLA WEBSTER,
VINCENT NEGRON, JOSEPH GRAYMON, WILLIAM MARLEY,
LENA MARLEY, ARNOLD GERBER, SONDRA GERBER,
BERNICE SHENHOUSE, JOHN KOLLOCK, WANSER BALTROP,
FRANCES BROWN, FRED WILSON, LILLIAN WAGNER,
LUISE BRITT, MARY BROWN, EDDIE MAE GREENE,
JACQUELLINE HOGAN, NATHANIEL MILLER, HENRY R. FULLER,
ARLENE KIRKLAND, ROSE YOUNG, JAMES FISHER, HUME SMITH,
RUTH SEFF and KATE BALIS,

From the continuing action of the Board of Education of the City of New York in refusing to institute an educational park in East Brooklyn and instead continuing to construct segregated and imbalanced schools resulting in the inclusion of such schools in the Capital Budget for 1966-1967 as approved by the Mayor of the City of New York on April 20, 1966.

---X

BRIEF OF AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE,
BROWNSVILLE COMMUNITY COUNCIL, INC., CATHOLIC INTERRACIAL COUNCIL,
CONGRESS OF RACIAL EQUALITY, EQUAL, NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, NEW YORK CIVIL LIBERTIES UNION,
OFFICE OF CHURCH AND RACE OF THE PROTESTANT COUNCIL OF NEW YORK CITY,
SCHOLARSHIP EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY,
URBAN LEAGUE OF GREATER NEW YORK, AS AMICI CURIAE

This proceeding is brought before the Commissioner pursuant to Section 310 of the Education Law. The facts are fully detailed in the Petition and will be only briefly summarized here.

The petitioners, of whom some are white, some Negro and some Puerto Rican, brought this action on their own and on their children's behalf, as well as on behalf of all members of their respective groups, white, Negro and Puerto Rican, similarly situated. They seek redress from the decisions and actions of the New York City Board of Education (hereinafter called the "Board") which rejected plans for an integrated educational park for the East Brooklyn area and adopted instead a plan that not only does not provide for integration of existing facilities but provides for building a number of new schools many of which would be segregated. The Commissioner has issued an order staying further steps toward the construction of seven proposed schools in the East Brooklyn area pending the outcome of this proceeding.

The undersigned organizations submit that the Board's plan for the East Brooklyn area violates both the educational policies of this State and the requirement of the United States Constitution.

Interest of Amici Curiae

The American Jewish Congress is an organization of American Jews established in part to help secure and maintain equality of opportunity for Jews everywhere, and to safeguard the civil, political, economic and religious rights of Jews everywhere. It established its Commission on Law and Social Action in 1945, in part to fight every manifestation of racism and to promote the civil and political equality of all minorities in America.

The American Jewish Committee is a human relations organization founded in 1906 to combat discrimination and bigotry.

The Brownsville Community Council, Inc. is a non-profit membership corporation comprising over 50 member organizations in the Brownsville area including nine parents associations. It believes that providing quality integrated education is crucial to its goal of bettering its community.

The Catholic Interracial Council of New York composed of white and Negro Catholics was founded in 1934 to combat racial bigotry and discrimination. It is active in the continuing struggle to secure for minority groups the same rights and privileges that other Americans already enjoy.

Eugene C.

The Congress of Racial Equality (CORE) is a national organization with thousands of members, many in New York City ~~and State,~~ which is devoted to racial equality. It recognizes that problems related to ~~education~~ police-civilian relations are crucial in a democratic society.

EQUAL is a city-wide organization of parents and other individuals working for total reorganization of public education to assure every child (1) equality in education, (2) quality education superior to that provided under the present system.

The National Association for the Advancement of Colored People (NAACP) is an organization devoted to obtaining equal rights for Negro citizens by lawful and peaceful means. Among the rights sought to be secured by law is that of equal opportunity in education.

The New York Civil Liberties Union, an affiliate of the American Civil Liberties Union for the New York State area, is a non-partisan and non-profit organization devoted to protecting individual rights and liberties guaranteed by the State and Federal Constitutions.

The Office of Church and Race of the Protestant Council of New York City represents the concern of the Protestant churches of New York City for the equal rights of all citizens. It is particularly concerned with the problems of racial segregation in New York City's public schools.

The Scholarship Education and Defense Fund for Racial Equality (SEOF) is devoted to ~~legal~~ protection of ~~for all through the~~ protection of ~~quality, integrated education as a fundamental~~ ~~legal~~ rights for minority groups. necessity in the United States.

The Urban League of Greater New York is a social welfare organization designed to obtain equal opportunities and social justice in the Greater New York area. One of its primary concerns in the New York area has been the quest for quality, integrated education.

STATEMENT

All petitioners are residents of the Borough of Brooklyn in the City and State of New York. Most of them reside in and have children who attend public schools in the East Brooklyn area. That area is made up of four communities; Brownsville, East Flatbush, East New York and Canarsie. A study issued by the New York City Board of Education in April 1965 entitled "The Educational Park in New York" (a copy of which is annexed to petitioners' papers as exhibit F) concludes that the Flatlands area at the hub between the four East Brooklyn communities is an excellent site for an educational park which would provide quality integrated education. The same conclusion was reached by the City Planning Commission (see p. ii of the Draft Capital Budget of the City Planning Commission, dated January 3, 1966 -- contained in the CITY RECORD, a copy of which is annexed to the petition as exhibit I).

The Board has explicitly recognized the need for action in this area. In its April 1965 study, it said:

> At the present time, the Brownsville schools are attended almost entirely by children who are Negro or Puerto Rican; the East Flatbush and East New York areas are either largely white or in transition; and the Canarsie community is largely white.

Nevertheless, after first supporting the Flatlands site for an integrated educational park, it has now rejected it. Far from proposing any substitute that would roll back segregation, it has adopted a plan for construction of new schools, many of which will be segregated. It has not budgeted any funds or made public any plans to integrate a significant number of the schools now existing in the East Brooklyn area.

In order to obtain quality integrated education for their children, petitioners ask that the Board be restrained from taking any further action with regard to construction or preparation for construction of schools in the East Brooklyn area until the Board has incorporated in its East Brooklyn school construction program such specific steps to desegregate and racially balance proposed and existing schools as are formulated by the Commissioner after an investigation of the facts.

Petitioners assert that an educational park costing no more than the 105-million-dollars the Board now plans to spend in the area would not only solve nearly all the integration problems for the entire area but would result in a major improvement in the quality of education. The undersigned _amici curiae_ support that position. We wish to stress the point that more than one alternative may be available. In view of the Board's failure even to plan much less to carry out any meaningful affirmative action to integrate the East Brooklyn schools in the 12 years since the United States Supreme Court condemned racial segregation in education in _Brown v. Board of Education,_ 347 U. S. 483 (1954), and in view of the fact that this plan admittedly perpetuates segregation, the time has come for action by an impartial expert to formulate specific steps to achieve integration. The question to be determined at this stage is not whether an educational park is the best answer or, if it is, its site and other details. Given ten years of inaction by the Board, leading to issuance of the "Allen Report,"* two years of inaction since that Report, during which its recommendations have been ignored, and, Board promulgation of a 105-million-dollar plan that will not integrate existing facilities but will create new segregated facilities and will permanently fix schooling in East Brooklyn in a segregated pattern, the question at this stage is whether the petitioners and the classes they represent are entitled to action by the Commissioner insuring formulation and implementation of an integration plan for their community.

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* "Desegregating the Public Schools of New York City" by The State Education Commissioner's Advisory Committee on Human Relations and Community Tensions (May 12, 1964).

In the following pages, we urge (1) that the Commissioner has made it clear that it is the policy of this State that all public school authorities have an obligation to take affirmative action to prevent racial segregation; (2) that the New York City Board of Education has failed to fulfill that obligation, generally and in East Brooklyn specifically; and (3) that construction of an educational park in East Brooklyn is at least one feasible alternative.

ARGUMENT

I. THE BOARD'S ACTIONS ARE CONTRARY TO THE POLICY OF THE STATE OF NEW YORK REQUIRING EACH BOARD OF EDUCATION TO TAKE ALL REASONABLE AFFIRMATIVE ACTION NECESSARY TO PROVIDE FOR CONSTRUCTION OF INTEGRATED SCHOOL FACILITIES AND DESEGREGATION OF EXISTING FACILITIES.

The Supreme Court's decision of 1954 in the Brown case, supra, stimulated intensive reevaluation of the phenomenon of racial segregation in our public schools -- north as well as south, de facto as well as de jure. Particularly in the north, the effects of segregation were reviewed by educational authorities and a number were led to conclude that it is educationally harmful whether or not it has the sanction of law. In this state, the Department of Education, exercising its responsibility of supervision of local educational policy, concluded that school segregation was an evil that must be brought under control regardless of whether it results from changes in the racial composition of an area or from the placing of schools in areas known to be ghettos.

Thus, on January 28, 1960, the Board of Regents issued a Statement of Policy which included the following:

> The State of New York has long held the principle that equal opportunity for all children, without regard to differences in economic, national, religious or racial background is a manifestation of the vitality of our American democratic society and is essential to its continuation. This fundamental educational principle has long since been written into Education Law and policy. Subsequent events have repeatedly given it moral reaffirmation. Nevertheless, all citizens have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.

In a memorandum to all chief local school administrators and presidents of boards of education dated June 14, 1965, the State Commissioner of Education stated the policy of New York State with regard to racial imbalance as follows:

> The position of the Department, based on the policy of the Regents, and the principles of the Commissioner's Advisory Committee, is that the racial imbalance existing in a school in

> which the enrollment is wholly or predominantly Negro interferes with the achievement of equality of educational opportunity and must therefore be eliminated from the schools of New York State.
>
> If this is to be accomplished, there must be corrective action in each community where such imbalance exists. In keeping with the principle of local control, it is the responsibility of the local school authorities in such communities to develop and implement the necessary plans.
>
> It is recognized that in some communities residential patterns and other factors may present serious obstacles to the attainment of racially balanced schools. This does not, however, relieve the school authorities of their responsibility for doing everything within their power, consistent with the principles of sound education, to achieve an equitable balance. (Emphasis added.)

The State requirement that all affirmative action be taken to balance schools racially, consistent with the maintenance of the quality of education, was underscored by the request in the memorandum that before the beginning of the next school term recipients of the memorandum forward to the Commissioner the following:

> 1. A statement indicating the situation in your district with regard to any problem of racial imbalance, regardless of the number of Negro children enrolled, or to the actual existence of or trend toward racial balance. At this time and for the purpose of this report, a racially imbalanced school is defined as one having 50 per cent or more Negro pupils enrolled.
> 2. A statement of policy by your board of education with respect to the maintenance of racial balance in your schools.
> 3. In districts where racial imbalance exists, or is a problem, a report of progress made toward eliminating it.
> 4. In such districts, your plan for further action, including estimates of the additional cost, if any, and of the time required for carrying out your plan. (Emphasis in original.)

This policy finds firm support in the decision of the United States Supreme Court dealing with school segregation. Thus, in the Brown case, the Court held that, even when tangible factors are provided in equal amounts, racially segregated public schools provide education which is inherently unequal. It said (347 U. S. at 495):

> Separate educational facilities are inherently unequal. Therefore we hold that the petitioners and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

In Cooper v. Aaron, 358 U. S. 1, 7 (1958), the Court restated the Brown holding and said that the Constitution required state authorities in Arkansas to

> ... devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

The Supreme Court has not yet ruled on whether these rulings require public schools to move affirmatively to deal with so-called de facto segregation. However, there is impressive authority in lower court decisions for the proposition that the holdings in the Brown and Aaron cases mean that the State's racial balance policy is not only sanctioned but required by the Constitution. Thus, the Federal District Court for the Eastern District of New York has said:

> The central constitutional fact is the inadequacy of segregated education. That it is not coerced by direct action of an arm of the state cannot, alone, be decisive of the issue of deprivation of constitutional right .... The educational system that is compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted.
>
> Failure to deal with a condition as really inflicts it as does any grosser imposition of it. (Branche v. Board of Education, 204 F. Supp. 150, 153 (E.D., N. Y. 1962)).

Similarly, the Supreme Court for the State of California, sitting en banc, has held:

> ... even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school.... Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and

> the harmful consequences of segregation require that school boards, take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause. (Jackson v. Pasadena School District, 31 Cal. Rep. 606, 382 P. 2d 878 (1963)).

There are, of course, decisions looking the other way, notably Bell v. School Board of Gary, 321 F. 2d 209 (7th Cir., 1963), cert. denied, 377 U. S. 924 (1964). It is clear, however, that even those decisions create no doubt as to the power of school officials, local and state, to deal with racial imbalance as an educational evil. This was made clear by the Court of Appeals in Matter of Balaban v. Rubin, 14 N. Y. 2d 193.

New York State's requirement that its school officials take whatever reasonable steps are available to achieve racial balance is a policy requiring action by local school officials, not merely policy statements indicating agreement in theory with racial balancing. The Commissioner made this clear in Mitchell v. Malverne (2 Educational Reports 501 (1963)), when he formulated specific steps to balance the Malverne schools which the local board was required to institute. We submit that the time has come for similar action in New York City.

II. THE NEW YORK CITY BOARD HAS FAILED TO TAKE AFFIRMATIVE ACTION ON EITHER A CITY-WIDE LEVEL OR IN EAST BROOKLYN.

On December 23, 1954, in response to the Brown decision, the New York City Board of Education stated that its policy was to take affirmative action to eliminate segregation in the schools. It appointed a Commission on Integration and stated in an accompanying document, entitled "Preliminary Statement of Board of Education Resolution for Action":

> It is imperative that members of this Commission approach their responsibility with the understanding that racially homogeneous public schools are educationally undesirable. It is now the clearly reiterated policy and program of the Board of Education of the City of New York to devise and put into operation a plan which will prevent the further development of such schools and would integrate the existing ones as quickly as practicable. (Emphasis supplied.)

At that time, there were nine segregated junior high schools and 43 segregated elementary schools -- a total of 8% of all schools ("The Status of Negro and Puerto Rican Children in the New York City Public Schools," Public Education Association Study (1955)).

In 1963, in a pamphlet entitled "Policy on Integration" which includes the subtitle, "A Re-affirmation of the Policy Originally Adopted in 1954," the Board stated:

> Our school system must vigorously employ every means at our disposal to desegregate schools and classrooms and to bring about true integration as soon as possible.

At that time, there were 31 segregated junior high schools and 134 segregated primary schools -- a total of 23% of all schools. (Computed from news release dated January 6, 1964 from the Office of Education Information Services and Public Relations of the Board of Education of the City of New York #N-151-63/64 and the accompanying Central Zoning Unit Tables.) Thus, in the nine years following the Brown decision, instead of decreasing, the percentage of segregated elementary and junior high schools more than tripled. Furthermore, from 1957 to 1963, while the proportion of Puerto Rican and Negro children in the elementary schools increased 36%, there was a 104% increase in the proportion of segregated Negro-Puerto Rican elementary schools (ibid). The Board's failure to take meaningful action in this field is reflected in the conclusions of the Allen Report, among which are the following (pp. 27-28, emphasis in original):

> 3. The Board of Education has made efforts between 1954 and the present which were intended to reduce segregation. These efforts have had no measurable effect upon the overall number of students attending segregated schools or upon the number of segregated schools in the system.
>
> 4. Early in 1964, the Board of Education introduced new proposals intended to aid in desegregating the public schools. The new proposals considered singly and in combination, would not reduce current levels of school segregation or prevent future increases.

5. Ethnic segregation cannot be wholly eliminated from the schools of New York City in the foreseeable future, but the adoption of wise and intelligent policies can reduce segregation substantially. The basic requirement is a deep and sustained commitment on the part of the Board and its staff to the purpose of reducing segregation throughout the city at the earliest time and at the fastest possible rate.

6. The adopted building program of the Board does not treat desegregation as a main factor in choosing sites, although this factor could be utilized.

The patterns of segregated residential neighborhoods which exist throughout New York City, coupled with the increase in the proportion of New York City's population comprised of Negroes and Puerto Ricans, undoubtedly makes the task of integrating the city's schools difficult. But those difficulties were recognized in the Allen Report which nevertheless concluded that important steps could be taken which would reduce the number of schools already segregated and stop the trend of increasing segregation. The Board's record of action, as distinguished from words, shows no acceptance of that conclusion.

What is most disturbing about the Board's statements and actions is an underlying quality of defeatism. It is not insignificant that whenever the Board refers to integrated neighborhoods they are classified as either fringe areas or transition areas. Apparently, the Board does not think in terms of integrated neighborhoods. It sees integrated areas as being on the boundary between white and minority ghettos or in the transitional stage of becoming ghettos.

Moreover, the Board fails to recognize the powerful effect schools can have in determining whether a neighborhood is to be stabilized on an integrated basis or is to be disrupted by panic and flight. Obviously, the placement and character of new educational facilities in a "transition" area can play a major role in stabilizing it as a settled integrated neighborhood.*

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* In a recent study by the National Opinion Research Center, "Social Psychological Factors in Intergroup Housing -- Results of Pilot Test," by Seymour Sudman and Norman Bradburn (May, 1966), it was found that (p. 10): "Among community facilities

The Board's failure to recognize this is revealed in the affidavit of Jacob Landers, the Board's Assistant Superintendent in Charge of Integration, sworn to June 20, 1966, in which he said (at p. 5):

> There appears to be a consensus among recognized experts that new schools, if they are to remain integrated, should be built within white areas rather than in fringe areas.

The implications of this statement are truly astounding. Integrated areas will not get new schools. But clearly, integrated areas will not develop as viable communities nor will they even remain integrated fringe areas if their schools become crowded or are allowed to deteriorate without replacement. If the Board recognized that integrating schools and neighborhoods must be part of one process, it would put its best facilities into these so-called "fringe" areas. Under the program of building new schools in white areas, the white areas will become whiter and the fringe areas will become new ghettos with old run-down schools. Statements like this strongly suggest that, when Negroes move in, whites and the Board of Education move out. The Board's history of abdicating its responsibility to integrated neighborhoods necessarily breeds defeatism among the residents and encourages flight by those who can afford to move elsewhere.

In East Brooklyn, a board of education seeking to make integration work rather than to justify why it fails to act would not seek to inflate the future possible growth in the number of minority school children in Brownsville. It would call attention to the reservoir of white children in the rapidly growing white population in the Midlands-Flatlands-Sheepshead Bay area immediately west of East Brooklyn. Children from that area could supplement the children from

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which attract and keep residents, schools are considered the most important, then churches, then recreational facilities, and then community organizations." One of the persons interviewed in the study said (p. 39): "The kind of people we want here will be attracted by schools only. As long as our schools are overcrowded we can't attract or keep them."

the Canarsie area in guaranteeing that even if the most dire (and unfounded) Board predictions of ethnic change in population were to come to pass, a racially balanced school population could be maintained in an educational part located in East Brooklyn.

Mr. Landers' affidavit also contains the following statement (at p. 5):

> Educational plants are rarely economical if their life is less than 40 or 50 years. Therefore, in selecting a site for an educational park, due consideration must be given to education in the future. From this point of view, the Flatlands site would appear to lead to de facto segregated schools.

This statement obfuscates the entire issue. It suggests that the alternatives are to build an educational park or do nothing. In fact, the alternatives now under consideration are (1) plans for the construction of seven schools which will lock the entire East Brooklyn area into a 105 million dollar program which will not desegregate one school but will inevitably increase the number of segregated schools in the area and (2) a plan which would provide quality integrated education with the same or less money. If an educational park is not economical unless we can prove that in 40 or 50 years it will not be segregated, then certainly the Board should be required to prove that its construction plan is "economical" in the sense that it will not produce schools which will be segregated at the time of completion. The ridiculous suggestion that petitioners must prove that in 40 or 50 years an educational park would be integrated is indicative of the negativism permeating the Board's attitudes towards any plan designed to provide integrated education without delay.

In sum, the Board has failed to take effective action to effectuate the conclusion reached in the Allen Report that segregation in the City's schools can and should be dealt with. Unless that conclusion is now to be reversed, explicitly or by implication, the Commissioner will have to exercise his authority to require the Board to take specific steps.

Even if the city-wide failure of the Board to take action to desegregate is ignored, its failure in East Brooklyn is clear. Its inability to formulate alternatives to the construction of segregated schools in East Brooklyn is plainly shown in petitioners' papers. Attention is called to the three following specific factual matters only because they are typical of the actions of the Board and illustrate the variance between the Board's stated policy and its actions.

(1) Mayor Lindsay rejected the Board's plan to build two intermediate schools in East Brooklyn, I.S. 342 and I.S. 343, on the grounds that they would inevitably be segregated Negro-Puerto Rican schools. The 1967-68 school building program of the Board of Education indicates that once again the Board is requesting money to build the same schools in the same areas.

(2) The affidavit of Helen Efthim in support of the temporary stay sets forth how, after great struggle, local groups were able to move the site for Junior High School 275 from the center of Brownsville in which its students would have been almost entirely Negro and Puerto Rican to Linden Boulevard, the color line in East Brooklyn, so that the school would be integrated. To the consternation of the Brownsville community groups, one side of Junior High School 274's school district was tentatively drawn flush with the school at Linden Boulevard (the white neighborhood starts across the street) so that the entire student body would be Negro and Puerto Rican. After exerting additional pressure, the school district's shape was slightly modified so that a token number of white children were included in 275's district. However, to this day the school is still basically a segregated Negro-Puerto Rican school, although it is situated on the border between white and Negro-Puerto Rican neighborhoods.

(3) In what purported to be an implementation of the Allen Report's recommendation that a 4-4-4 system be created (a four grade neighborhood elementary

school, followed by a four grade integrated intermediate school, which in turn is followed by a four grade integrated high school), the Board altered 5 of the 11 Brownsville elementary schools, all segregated Negro-Puerto Rican schools, to the suggested four grade elementary school but then sent the fifth and sixth grades to Junior High School 275 and Junior High School 263, both of which are segregated Negro-Puerto Rican schools. The paralysis which overcomes the Board when it attempts to deal with the issue of segregation is underlined by the fact that, in each of the five cases where Brownsville elementary schools had been switched to four-year elementary schools, the fifth and sixth grade had been sent to segregated intermediate schools. Not once has the switch to the 4-4-4 plan resulted in achieving integration -- the whole purpose of the 4-4-4 plan.

The undersigned organizations believe that the petitioners here are entitled to relief specifically with respect to the schools in East Brooklyn. The issue is not whether the Board has acted in good or bad faith. The issue is the effect of the Board's course of action, or inaction, on the children of East Brooklyn. The Commissioner, we submit, should not uphold Board decisions that condemn those children to segregated education for the indefinite future.

III. THE EDUCATIONAL PARK PROVIDES AT LEAST ONE ALTERNATIVE TO THE BOARD'S PLAN WHICH WOULD PROVIDE FOR INTEGRATED QUALITY EDUCATION.

The Board's unwillingness to take bold action to desegregate existing school facilities and insure that new facilities will be integrated is indicated by the way in which the Board has dealt with the educational park. The Allen Report strongly recommended the concept of the educational park as a means of providing quality integrated education. The original enthusiastic reaction of the Board to the concept is reflected in the pamphlet it prepared entitled "The Educational Park in New York City" (exhibit F to petitioners' papers). In that publication (at p. 16), the Board described the park as "one of the many avenues leading to the achievement of quality integrated education..." and as "a new and creative idea which in the judgment of many objective educators is highly responsive to the needs of education in modern urban society."

Originally, the Board determined that the Flatlands area at the hub of the four East Brooklyn communities was an ideal site for an integrated educational park. The two major communities, Brownsville and Canarsie, one white and the other Negro and Puerto Rican, would insure that the park was integrated. The Board concluded:

> There seems to be a likelihood of stability with reference to the numbers of pupils being served and their ethnic composition. For example, demographic projections based on social and economic factors seem to predict little change in the ethnic character of the Canarsie or the Brownsville areas. The East New York area most proximate to the site being considered seems likely to gain White pupils as a result of a planned construction such as Fairfield Towers (1150 apartments), Meadowland Estates (5500 apartments) and Park Shore Village (5850 apartments). On the other hand, the East Flatbush area will most probably gain minority group residents while losing White population, so that whatever ethnic balance is established will probably be maintained. (The Educational Park in New York City," p. 6 (1965).)

One year later, Mr. Landers states in his affidavit in opposition to the petition (at p. 3): "In light of recent studies of ethnic change it appears that the racial stability as originally projected for the education park considered for Flatlands, Brooklyn, will not be realized."

The affidavit of Anne Stein submitted by petitioners exposes the fallacious premises upon which the Board's latest study based its conclusion that the ethnic make-up of East Brooklyn is unstable. But even if we were to accept the Board's new demographic projections, the conclusion to be drawn is not that the Board of Education should desert East Brooklyn, abandoning it to a future of segregated schools, but that it should devise a program designed to cope with the situation - for example, implement its educational park.

Galamison

March 17, 1966

Mr. Marvin Rich
150 Nassau Street - Rm 1707
New York, New York 10038

Dear Marvin:

The following are my thoughts on John Silverberg's bill: (1) Every item referred to is an out-of-pocket expense so that someone ought to return them. None of them so far as I can tell represented a penny for John by way of payment. Many of them relate to the case of Galamaison v. New York, which of course is technically not our case, but Galamaison's. We agreed to help out, however, at the time it was felt it was important that CORE be the main organization involved in these varieties of legal matters. While I realize that John has to be reimbursed, I do resent the fact that Galamaison is not offering a nickle. The total bill is $1,336.05, and every cent of it for legitimate expenses. Of that sum, he has received back from Brooklyn CORE $200.00; and from some individuals associated with Brooklyn CORE, $116.00, thus reducing the amount not paid to $1,020.05. John is frequently helpful to us on lots of matters and so I want to make certain that he be reimbursed for out-of-pocket expenses. He does take cases for us and help us in a variety of ways.

My recommendation is that he be paid, but I wonder if there is not some way that we can approach the Reverend Milton Galamaison and see if we cannot get some offering for these expenses.

Sincerely,

Carl Rachlin,
General Counsel

CR:gm

Rachlin

JOHN E. SILVERBERG
15 Park Row
New York, N. Y. 10038

June 30, 1966

Dear Sir:

Enclosed herewith please find the petition and stay order in the appeal before Commissioner Allen against the Board of Education in East Brooklyn.

The stay order has great significance as a precedent for delaying school construction so that the Commissioner may preserve the status quo while he considers a segregation suit.

I believe the suit has great merit and there is every possibility that the Commissioner will take jurisdiction as he did in Malverne.

A hearing on the merits is to be held July 13, 1966. Our case would be enhanced by the participation of your organization. If you are willing to participate as amicus curiae, will you please write to Commissioner Allen informing him of your intention to do so.

If you will then send me a copy of your letter, with the name and address of your attorney, preferably by July 7, I will forward to him the additional pleadings in the case so that he may be fully apprised of the facts and issues. Please contact me at the above address or by phone at BE 3-7990.

Hoping for your immediate response. As you can see, time is short and we are doing this as quickly as possible.

Very truly yours,

John E. Silverberg
John E. Silverberg
Attorney for the petitioners.

IMPORTANT: A meeting of the City-wide Conference on the Educational Park to discuss the hearing will be held on Wednesday, July 6, at 8 p.m. at the Interfaith Church Center, 475 Riverside Drive, Conference Rooms C and D. The Claremont Ave. entrance, between 119th and 120th Streets, should be used. Your attendance is desired as strategy will be discussed. Please call Mrs. Wheeler, RI 9-1214, and let her know whether you can attend.

[May 3, 1967]

UNIVERSITY OF THE STATE OF NEW YORK
STATE DEPARTMENT OF EDUCATION

IN THE MATTER

of the

APPEAL OF MILTON A. GALAMISON, THELMA HAMILTON,
HELEN EFTHIM, CURTIS GRACE et al., from the
continuing action of the Board of Education of
the City of New York in refusing to institute
an education park in East Brooklyn

DOCUMENTS
ANNEXED TO
ORIGINAL
ONLY

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JOHN E. SILVERBERG, being duly sworn, deposes and says:

That he is the attorney for the petitioners herein and makes this affidavit in support of the positions taken by petitioners herein.

That your deponent has read the "1967-68 School Building Program" adopted September 28, 1966 of the Board of Education of the City of New York, as well as the "1967-68 Draft Capital Budget --- as adopted by the City Planning Commission on December 29, 1966" which appears in the City Record of December 30, 1966, as well as the "Executive Capital Budget for 1967-68" which appears in the City Record of February 1st, 1967, together with the "Capital Budget for 1967-68" which appears in the City Record of April 25, 1967 and the "Capital Budget for 1966-1967" which appears in the City Record of April 21st, 1966; copies of each are annexed hereto and made a part hereof.

It is apparent from a reading of these various documents, that while the respondent proposed the inclusion of stayed school PS 301 for the 1967-68 Capital Budget, that proposal was rejected by the City authorities. Accordingly, when on page 15 of his letter to the Commissioner, Mr. Garrison states "presumably PS 301 could be eliminated" and later on the same page says "we should go ahead with the construction of PS 301, even if J-263 is converted...", he is discussing a matter which has already been taken out of the hands of the Board of Education by the City authorities, since no funds were budgeted for PS-301 in the 1966-67 Budget and said school fails to appear altogether in the 1967-68 Capital Budget.

At the last hearing, there was some debate as to the funds actually available to the respondent to commence building an Education Park and/or Linear Park. Deponent now wishes to clarify that point:

> Concerning the seven stayed schools in the 1966-67 Capital Budget, there were no funds available as of 3-25-66 for any of them. However, PS-245 was awarded $ 2,800,000.00 as of July 1st, 1966, and IS-363 was awarded $4,300,000.00 as of July 1st, 1966, and P.S. 347 was awarded $2,800,000.00 as of July 1st, 1966 for a total of $9,900,000.00 which is presently available.

The 1967-68 Capital Budget indicates that as of April 1st, 1967, the above said $9,900,000.00 was in fact awarded, and that this year on July 1st, 1967, an additional $920,500.00 will become available to respondent for a grand total of $10,820,500.00.

It is submitted that this sum would be sufficient to begin either an Education or Linear Park with centralized facilities at the east end of the track as proposed by petitioners at the hearing.

It should also be noted that in the 1967-68 Capital Budget, that IS-342 and 343 have been given final approval by the City for the Brownsville area as of 4-25-67. This is significant because Exhibit "A" on the Garrison letter of 4-10-67, depicts 342 and 343 outside of Brownsville. However, there is a note at the bottom of said Exhibit "A" which says "Intermediate schools designations along the 'spine' are for identification purposes only. The actual installations may be in different locations and forms."

Sworn to before me this

3 day of May, 1967

John E. Silverberg

JOHN E. SILVERBERG

FRED L. SOBEL
NOTARY PUBLIC, State of New York
No. 24-3753780
Qualified in Kings County
Commission Expires March 30, 1969

July 7, 1966

Re: The Appeal
of Milton A. Galamison,
Thelma Hamilton, Helen
Efthim, Curtis Grace
et al from the continuing action of the Board
of Eduction of the City
of New York in refusing
to institute an education
park in East Brooklyn

Dear Sir:

The Scholarship, Education and Defense Fund For Racial Equality and The Congress Of Racial Equality hereby respectfully request leave to file a brief amicus curiae in this case.

Our interest in this case arises both from great public concern and our particular concern with the elimination of racial segregation in the New York City schools.

Respectfully,

Carl Rachlin
General Counsel

LAW OFFICES
BLUMENTHAL, SOMERS & GOLDSTICK

ALBERT H. BLUMENTHAL
JOHN C. SOMERS
DAVID T. GOLDSTICK
BENNET M. BLUMENTHAL
COUNSEL

10 EAST 40TH STREET, NEW YORK, N.Y. 10016
TELEPHONE: 683-8650

July 8, 1966

Lester Greenberg, Esq.
American Jewish Congress
15 East 84th Street
New York, New York

Re: Galamison, et al. v. Board of Education, et al.

Dear Lester:

I enclose the material on Section 2, i.e. Educational Park.

I now understand that Silverberg intends to submit affidavits of Wolff, Dentler, etc. Also, I've noted that pages 11 to 18 of the petition are solely concerned with this question. Thus, it appears that we would furnish a decided service to indicate the basis for the proposition that there is a reasonable alternative to the proposed segregated schools.

The material that I have prepared has been "begged, borrowed and stolen." Annie Stein and Ellen Lurie have been most helpful, as have you in giving me an 11th-hour education.

Please do not hesitate to edit, recompile or alter in any way the material. You will note the flow, i.e: (1) Relation of Educational Park to this case; (2) History of Educational Park in East Brooklyn-Flatlands'Site; (3) What the experts say; (4) Feasibility and experimentation to meet segregation.

Kindest personal regards.

Sincerely yours,

BLUMENTHAL, SOMERS & GOLDSTICK

BY:____________________________
John Somers

JS:na
Enc.
cc.: Carl Rachlin, Esq.
Mr. Irving Levine
Mr. Aryeh Neier

Galamison
1966

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
ALBANY, NEW YORK 12224

July 11th, 1966

CHARLES A. BRIND
COUNSEL

DIVISION OF LAW
JOHN P. JEHU, DIRECTOR
ELIZABETH M. EASTMAN
GEORGE B. FARRINGTON
LOUIS H. J. WELCH

Carl Rachlin, Esquire
General Counsel, Scholarship, Education and Defense
Fund for Racial Equality
150 Nassau Street
New York, New York 10038

Re: Matter of Appeal of Milton A. Galamison
et al v. Board of Education, City of
New York

Dear Mr. Rachlin:

In reply to your letter of July 7, 1966, permission has been granted the Scholarship, Education and Defense Fund For Racial Equality and The Congress of Racial Equality to file a brief Amicus Curiae in the matter of the above captioned Appeal to the Commissioner. The granting of the request does not include participation at the oral argument but the brief will be taken into consideration by the Commissioner in his decision in the matter.

Very truly yours,

John P. Jehu

JPJ/mmd

JUL 21 1966

LAW OFFICES
BLUMENTHAL, SOMERS & GOLDSTICK

ALBERT H. BLUMENTHAL
JOHN C. SOMERS
DAVID T. GOLDSTICK
BENNET M. BLUMENTHAL
COUNSEL

10 EAST 40TH STREET, NEW YORK, N.Y. 10016
TELEPHONE: 683-8650

July 19, 1966

Lester Greenberg, Esq.
American Jewish Congress
15 East 84th Street
New York, New York

Re: Galamison, et al. v. Board of Education, et al.

Dear Lester:

First off, I would like to congratulate you on the very able and workmanlike job you did in the preparation of the amicus brief. I spoke at a board meeting of the N.Y.C.L.U. and they were most pleased with the extensive research and able presentation that you undertook.

Carl Rachlin has done some slight editing which I have reviewed, and certainly have no objection to. Either in the original form that you had undertaken or as modified by Carl, it meets with the approval of the N.Y.C.L.U. and you are authorized to affix their name to the amicus brief.

I would appreciate a final copy at your convenience.

Let me add, however, that unfortunately a meeting in Philadelphia, previously scheduled, prevents me from attending the meeting on Wednesday, July 20th. I offer this apology in passing because I would like to be present to hear the comments and observations of others.

Kindest personal regards.

Sincerely yours,

JOHN SOMERS

JS:na
cc.: Mr. Aryeh Neier
Mr. Irving Levine
Carl Rachlin, Esq.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
ALBANY, NEW YORK 12224

CHARLES A. BRIND
COUNSEL

August 9, 1966

John J. Loflin
Assistant Corporation Counsel
in charge of Division of
General Litigation

Dear Mr. Loflin:

Your letter of August 4, 1966 to the Commissioner of Education and Mr. Silverberg's letter of August 5, 1966 to the Commissioner of Education have been referred to me.

You may have until August 12, 1966 to file your brief.

Sincerely yours,

Charles A. Brind

LW/das

CC:
Hon. Lloyd K. Garrison
Board of Education
110 Livingston Street
Brooklyn, N.Y.

John E. Silverberg, Esq.
15 Park Row
New York City

Joseph B. Robison, Esq.
c/o American Jewish Congress,
15 East 84th Street,
New York City

August 10, 1966

Hon. James E. Allen, Jr.,
State Commissioner of Education,
Education Building,
Albany, N.Y.

Re: Appeal of Galamison, et al.
v Board of Education of the
City of New York

Dear Commissioner Allen:

As I mentioned in my prior letter of August 4, 1966 the Board of Education has been considering proposals which, if adopted, might well lead to a conclusion of the pending litigation referred to above. In the annexed affidavit of Lloyd K. Garrison, President of the School Board of the City of New York, you will find an outline of new proposals for educational parks in the area of East Brooklyn involved in the appeal. Until further studies are made, public hearings are held, and the views of many interested parties are considered, the effect of the new programs, if adopted, cannot be measured precisely. It is abundantly clear, however, that the Board has now decided to proceed at this time to consider new educational parks without waiting for the completion and evaluation of the parks previously planned for Co-op City and the Kingsbridge area of the Bronx.

When more details are developed concerning the Board's plans, the appellants in this matter may agree or disagree with them but I think it is beyond dispute that new studies would be necessary even under appellants' plan in light of the fact that the site originally proposed by them has been set aside for an industrial park and is no longer available.

The proposals outlined in Mr. Garrison's affidavit have such a direct and material effect on the matters now pending decision in this litigation, that the appeal may be brought to a close if the new proposals are adopted. But even if appellants do not find the new proposals acceptable and wish to press on with the litigation, it seems equally obvious that when the time for final decision arrives you should have before you the current plans of the Board for the East Brooklyn area which may differ substantially from those presently before you and may include provisions for educational parks.

It seems much preferable to leave a school district free, if at all possible under the law, to meet and solve its own problems. This is clearly consistent with the legislative policy embodied in the Education Law. The New York City School Board has constructive proposals for meeting educational problems presented by the ethnic and social changes in East Brooklyn. In order to afford time for community reaction, to explore the new opportunities for combined use of school buildings, and to complete professional studies required to make its proposals concrete, the Board will need additional time. Consequently, I respectfully request that all further proceedings in this matter be suspended until December 1, 1966. We would, of course, be pleased to provide you with progress reports as the Board's plans are developed and public hearings are held, if you so desire.

I realize that the request for an adjournment is for a lengthy period. In light of the basic changes which are proposed and the complex questions raised, however, I submit the circumstances justify withholding a final decision in this matter with the hope that either a final decision by the Commissioner may not be necessary if the new proposals are acceptable to all concerned, or failing that, a final decision will be based on current programs rather than on plans which may be superseded or materially altered within the next few months.

Respectfully yours,

John J. Loflin

JOHN J. LOFLIN
Assistant Corporation Counsel
in charge of Division of
General Litigation

(Enclosure)

CC
Hon. Lloyd K. Garrison
Board of Education
110 Livingston Street
Brooklyn, N.Y.

John E. Silverberg, Esq.
15 Park Row
New York City

Joseph B. Robison, Esq.
c/o American Jewish Congress
15 East 84th Street
New York City

AMERICAN JEWISH CONGRESS, INC.
15 EAST 84th STREET
NEW YORK 28, N. Y.
TRAFALGAR 9-4500

August 12, 1966

Re: East Brooklyn School Case

Dear Friends:

Enclosed are copies of the papers submitted by the Board of Education in support of a request that the Commissioner stay all further action in this case until September. The request is based on the factual statement in the second paragraph of Mr. Garrison's affidavit that it is now impractical to locate an educational park in East Brooklyn in the Flatlands area. (Mr. Garrison's language is confusing but that would seem to be the substance of his statement.)

In the ten days made available to petitioners to reply to this request they intend to challenge this statement by using experts to show that such sites do in fact exist. In the event that counsel for any of the amici are available for research concerning this aspect of the case, please contact me.

We should be ready to publicize whatever alternative sites petitioners present to the Commissioner.

Sincerely yours,

Lester Greenberg

Lester Greenberg
Staff Counsel

Encls.

JOHN E. SILVERBERG
ATTORNEY AT LAW
15 PARK ROW
NEW YORK 38, N. Y.
—
BEEKMAN 3-7990

August 24, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable James E. Allen, Jr.
State Commissioner of Education
Education Building
Albany, New York

Re: Appeal of Milton A. Galamison, et al.
v.
Board of Education of the City of New York

Dear Sir:

Enclosed herewith please find affidavit of Walter Thabit, a single affidavit of Arthur A. Mittelstaedt and Caswell Miles, together with the affidavit of Herman Joseph, all of which are submitted in opposition to respondent's application for an adjournment of these proceedings to December 1, 1966.

Very truly yours,

JES:jam

JOHN E. SILVERBERG
Attorney for Petitioners

Enclosures

CC: Hon. Lee J. Rankin
Corporation Counsel of the City of New York
Attorney for Respondents
Hon. Lloyd K. Garrison
President, Board of Education of the City of New York
Joseph Robison, Esq.
Attorney for Amici Curiae

P.S. The qualifications of Messrs. Mittelstaedt and Miles will be served and mailed tomorrow and it is respectfully requested that same be deemed annexed to their affidavit.

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

In the Matter of the Appeal of

MILTON A. GALAMISON, THELMA HAMILTON,
HELEN EFTHIM, CURTIS GRACE, et al.,

From the continuing action of the Board
of Education of the City of New York in
refusing to institute and education park
in East Brooklyn, etc.

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF)

ARTHUR H. MITTELSTAEDT and CASWELL M. MILES, being duly sworn, deposes and says:

As consultants in the field of Educational Planning and Programming as evidenced on the accompanying credentials, we have reviewed all aspects of the case dealing with the Educational Park being studied for the Flatlands area of Brooklyn and have rendered our opinion. This opinion is based upon our findings following:

1) an examination of all available documents, including briefs, affidavits, reports, statistical data regarding
   - (a) the questions involved in the case
   - (b) the educational park concept, and the
   - (c) flatlands area

2) an investigation in the field of the Flatlands area and its surrounding communities

3) an inspection of all available maps of the area, including the land use map, community facility map, zoning map, and school building utilization map, and

4) an exploration of the Educational Park concept and the results of its establishment elsewhere.

As Educational Programmers and Planners, we admit to having a high regard for the value of the "Educational Park" "Educational Plaza" "School Village" "School Campus" and "School Park" concepts as visualized in varying ways in professional reports; journals, proceedings and studies. This conclusion might be considered fairly widespread throughout the nation as evidenced by the increasing attention to it in Philadelphia, Pittsburg, and New York and the incorporation of the concept into such school district plans as in East Orange, New Jersey; Mahwah, New Jersey; Youngstown, Ohio; Ft. Lauderdale, Florida; Southfield, Michigan; and Bloomington, Indiana. Of course the concept does have foes as well as friends. Such foes are based on the fact that schools should be built where people live to eliminate costly transportation costs and create local identity. However, this reasoning is in itself turning to an advantage. Costly transportation is a necessity anyway because of Federal, State, and local laws requiring balanced integrated educational facilities, and thus causing bussing throughout a district. The other fact of retaining local identity does not eliminate slums and provide a broader influence on the people of a local neighborhood. Therefore, our belief in the Educational Park concept is based in the fact that it achieves:

Better coordination between school levels

Larger centralization of research persons, equipment and facilities

Greater consideration of parking and service facilities in such places as multi-storie parking garages, etc.

Better instruction opportunities, such as ungraded classes, team teaching, etc.

Lower construction costs as expressed by Segner and Dalton, Consulting Engineers of White Plains

Greater utilization of academic programs, ETV, special teachers, EDP, etc.

Higher provision of inter-racial, inter-religious, and inter-national exchange

Wider incorporation of recreational and vocational facilities and activities.

We have also reviewed the outline, "The Educational Park in New York City Concept for Discussion" prepared by the New York City Board of Education and basically concur with the findings regarding "the site which seems to meet best the criteria which have been established". This conclusion has also been substantiated by the information in the report, "Flatlands Urban Industrial Park" prepared by the Housing and Development Board by Lippets, Abbett, McCarthy, Stratton in March 1961 and revised in March 1965, though the report's conclusion relates to industrial rather than educational use.

Our survey of the subject Flatlands property and its environs reflects a central location serving the four communities of Brownsville, East New York, East Flatbush, and Carnarsie. The site, predominantly vacant, would lend itself to the least possible acquisition and construction costs. Though there are two other alternative locations in the immediate vicinity, they would be successively higher in cost for acquisition and construction,as the costs for relocation and demolition would be involved in a necessary condemnation proceeding. The alternative locations in order of desirability are:

1. Properties - South of subject parcels - an area of one or two family old wood frame dwellings and subway storage yards. (Vicinity of Tarragut, Remsen, E. 100th and Avenue J)

2. Properties - Southeast of subject parcels - an area of junked autos and dumps. (Vicinity of Fairfield, Louisiana, Schroeder and Vermont Streets)

Both of the above locations are less central to the four communities than the originally proposed site for the Educational Park, though each would be readily accessible and suitable. However, the original site is more economical and logical as opposed to the alternates. Other reasons for the necessity for an Educational Park in the locality include:

- A need to replace the several old and substandard schools and meet the needs of an increasing school population. Without an Educational Park, new individually scattered schools would have to be constructed creating further segregated conditions and situations because of the associated deficiencies and inadequacies which would exist.
- A need to raise the environmental amenities of the area, thus encouraging continued urban renewal, slum clearance, junkyard controls and beautification. Without an Educational Park to enhance the area, continued substandard land uses will encroach into residential areas causing further deterioration and depreciation.
- A need to provide more open spaces for physical education and recreation programs. Without such facilities of an Educational Park, the communities will not have available these needed opportunities.
- A need to alter the ethnic imbalance in the existing schools. Without an Educational Park, new schools will still tend to be segregated during the school hours as well as after.

Thus, in our opinion, we deem the proposal for an Educational Park in the Flatlands area a highly desirable complex to serve the educational, cultural, recreational, and social needs of the people as well as enhance the physical character of the environment.

The postponement of the development of the Educational Park in East Brooklyn until it is tested in the Bronx would be a calamity. The Board of Education's own study and publications provided sound reasons for its decision in 1965 to develop an Educational Park in East Brooklyn as a step in meeting the recommendations of the Allen Reports and the needs of the children.

ARTHUR H. MITTELSTAEDT, JR.

C.M. Miles

CASWELL M. MILES

Sworn to before me this

24 day of August 1966

John E. Silverberg

JOHN E. SILVERBERG
Notary Public, State of New York
No. 41-8999915
Qualified in Queens County
Commission Expires March 30, 1968

AMERICAN JEWISH CONGRESS

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JACK B. WEINSTEIN
LEWIS H. WEINSTEIN
ALAN F. WESTIN
ROY WILKINS
A. L. WIRIN
MELVIN L. WULF
BENNETT YANOWITZ

August 25, 1966

Dear Friends:

Re: East Brooklyn School Case--Educational Park

Enclosed are the reply affidavits submitted by Mr. Silverberg on behalf of the petitioners in the above matter.

At this point we should consider whether we wish to file a reply brief based upon papers submitted since the amicus brief was filed. I believe it will be possible to pin down the morally and intellectually indefensible position taken by the Board in this case--something only suggested in Herman Joseph's affidavit.

If you agree, let me know by telephone immediately, since it will probably be difficult, if not impossible, to obtain permission to file an additional amici brief at this late date.

Sincerely,

Lester Greenberg

Lester Greenberg
Staff Counsel

enc.

NATIONAL OFFICERS

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SHAD POLIER, Chairman Governing Council
MORRIS MICHELSON, Co-Chairman Governing Council
FRANK ABRAMS, Treasurer
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253

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
ALBANY, NEW YORK 12224

CHARLES A. BRIND
COUNSEL

DIVISION OF LAW
JOHN P. JEHU, DIRECTOR
ELIZABETH M. EASTMAN
LOUIS H. J. WELCH
LORENZ F. LOERZEL
DONALD O. MESERVE
LEO BURD

Galamison

October 3, 1966

Carl Rachlin, Esq.
150 Nassau Street
New York, New York 10038

Dear Mr. Rachlin:

I am enclosing herewith a copy of the decision of the Commissioner of Education in the Appeal of MILTON A. GALAMISON, THELMA HAMILTON, HELEN EFTHIM, CURTIS GRACE, et al., from the continuing action of the Board of Education of the City of New York in refusing to institute an education park in East Brooklyn.

Sincerely yours,

Charles A. Brind
smo
Charles A. Brind

Enc.

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HENRY M. DI SUVERO, ALAN H. LEVINE, STAFF COUNSEL

MEMORANDUM

To: Carl Rachlin, Esq.
Stephen Nagler, Esq.
Mr. Lester Greenberg

From: Alan H. Levine

Date: October 13, 1966

Re: Galamison v. New York City Board of Education

Enclosed herewith is a copy of the Christopher Jencks' review of "Equality of Educational Opportunity" (New Republic, October 1, 1966)

November 28, 1966

Hon. James E. Allen, Jr.,
State Commissioner of Education,
Education Building,
Albany, New York 12224

Re: Appeal of Galamison, et al v.
Board of Education of the
City of New York

Dear Commissioner Allen:

I enclose herewith an affidavit of Lloyd K. Garrison, sworn to on November 23, 1966 and an affidavit of Adrian Blumenfeld, sworn to on November 28, 1966.

As you will see from the enclosed affidavits, President Garrison on behalf of the Board of Education of the City of New York has set forth for your consideration his report on the progress to date of the Board's reexamination of its school construction program for Brownsville and adjacent areas in Brooklyn, New York.

In your order of September 20, 1966 you directed the Board to reconsider its plans for this area. In compliance with this order the Board has reconsidered its plans and has caused further staff studies and investigations to be made. In addition, preliminary discussions have been held with some interested groups in the communities affected by the present and any amended school construction program. However, it has not been possible for the Board to complete its studies in this area due, in large measure, to the complexities of the questions presented but also due, in part, to the demands on the time of the Board members occasioned by the difficulties in starting the new school year and particularly the difficulties associated with I.S. 201 in Manhattan. Consequently, I regret I cannot at this time make a definitive report to you either reaffirming the position of the Board to continue with its present building plans or to propose an alternative plan.

As President Garrison points out, however, it is particularly significant that Cyril Sargent, Professor of Education and Chairman, Division of School Services, the City College of the City University of the City of New York, has undertaken a comparative study of the desirability of educational parks for Brooklyn, Philadelphia and Baltimore. In light of the fact that the educational park concept is novel and working models are impossible to find for guidance, it is expected that Dr. Sargent's study will be very useful for the Board in considering the possibility of an educational park for the areas adjacent to the Brownsville section of Brooklyn.

Dr. Sargent's report is anticipated by the end of January, 1967. The Board respectfully requests an additional extension of time within which to receive and study Dr. Sargent's report and also to complete related studies and conferences with persons in the localities that may be affected by any changes in the school construction program.

In light of the importance of the questions presented as well as their novelty and difficulty, we therefore request an extension of time to submit any further proposals until February 28, 1967.

I also invite your attention to the fact that President Garrison requests that P.S. 245 and P.S. 347 in Brooklyn be removed from the scope of your order which has the effect of staying the Board from any further steps toward construction of these elementary schools planned for Brownsville. The reason for this last request, as explained in more detail in the affidavit of Adrian Blumenfeld, is simple. These schools will be necessary regardless of the outcome of this appeal. The birth rate and anticipated increase in elementary school students together with the need for replacement of obsolescent schools will leave the Brownsville area substantially short of elementary school space even if the junior high schools in the area were converted into elementary schools. If these two schools are removed from the stay, under these circumstances, no possible prejudice could arise to appellants' position. Thus, there is no present need for continuing the stay as to these schools. There is a present need which will grow more severe as time goes on to proceed with planning, site acquisition and construction of these schools.

Appellants' proposals do not involve including elementary schools in the educational parks. The only purpose served in staying further progress of elementary schools was to preserve the status quo long enough for appellants' position to be examined under the assumption that new elementary school construction would not be necessary if the present junior high schools were vacated by students attending an educational park. Since the need for P.S.245 and P.S. 347 will exist regardless of the conversion of these junior high schools there is no further basis for continuing the stay with respect to them.

The area around Brownsville poses severe problems in many areas and certainly, not least, in the field of education. A large area, which has been rapidly expanding, consists almost entirely of Negro and Puerto Rican residents who live adjacent to certain areas which are largely composed of white persons. Making effective long range school plans for the area consistent with the applicable standards as to integration and quality education, under conditions of rapid growth and shifting ethnic boundaries, is difficult at best. Appellants put forward a novel solution in the form of an educational park. A host of new questions must be examined and tested against the theoretical values assigned to this concept. The studies that have been made and studies that are now being made will help in finding a solution which will, it is hoped, serve this area for many years to come.

Consequently, we feel it necessary to ask for an extension of time to submit further proposals until February 28, 1967 and we further request that the Commissioner act now to remove P.S. 245 and P.S. 347 from the stay presently in effect in this matter.

Respectfully yours,

John J. Loflin

JOHN J. LOFLIN
Assistant Corporation Counsel
in Charge of the Division of
General Litigation

as
cc: Hon. Lloyd K. Garrison
Board of Education
110 Livingston Street
Brooklyn, N.Y.

John E. Silverberg, Esq.,
15 Park Row,
New York City, N.Y.

Joseph B. Robison, Esq.,
c/o American Jewish Congress,
15 East 84th Street,
New York City, N.Y.

4 41 2434

[illegible]

May 9, 1967

Commissioner James E. Allen, Jr.
Education Department
Education Building
Albany, N. Y. 12224

Mr. CORDON

Re: Matter of Milton A. Galamison et al.
v. Board of Education, City of New York

Dear Commissioner Allen:

Ten months ago, the petitioners obtained from the Commissioner of Education a stay of construction of seven schools in East Brooklyn. Petitioners demonstrated that if the seven schools were built as planned, the schools would provide segregated education. It was also demonstrated that construction of the seven schools would tend to lock East Brooklyn into a comprehensive long-range building plan designed to provide neighborhood schools throughout the area. In almost every case, construction of such neighborhood schools would in effect insure segregated education for all the children of East Brooklyn for the foreseeable future. The parents' petition suggested a viable alternative, an educational park in the Flatlands area.

In the ten months that have elapsed since the stay was issued, the Board of Education has raised various objections to the parents' plan which, upon examination, as more particularly set forth in Mr. Silverberg's letter of May 3, 1967, evaporate. In addition, the Board developed the alternative proposal of a linear school complex as part of a linear city. As originally set forth in Cyril Sargent's proposal it held promise of providing the same type of quality integrated education as petitioners' educational park. The parents had every right to assume that the linear school complex was to be developed as a substitute for the former plans for East Brooklyn of the Board of Education. The whole purpose of the stay and subsequent hearings was to prevent the expenditure of $10 million for schools perpetuating and expanding segregated education.

Given this background one is nonplussed when in its latest proposal the Board rejects Mr. Sargent's alternative of a sophisticated integrated complex of educational facilities strung out within a linear city and requests removal of the stay so that the seven schools can be constructed as originally planned. Now ten months since the stay was granted it is reasonable to demand that action be taken to insure that this $10 million is used to provide quality integrated education in East Brooklyn.

Our original brief in this proceeding set forth in detail the dichotomy which exists between the Board of Education's good intentions and specific practices. The Board cannot be allowed to continue to talk integration while building for segregation.

Respectfully yours,

Murray A. Gordon

Memorandum from . . . AMERICAN JEWISH CONGRESS
15 East 84th St., New York, N. Y. 10028 • TR 9-4500

September 7, 1967

To: Amici
From: Lester Greenberg
Subject: Galamison, et al. v. Board of Education - East Brooklyn School Case.

I wanted to forward a copy of the decision to you without delaying to prepare an analysis of it. A meeting to discuss this, the most significant development in the case since the filing of the petition, will take place on Thursday, September 14, at Congress House, 15 East 84th Street, in the library on the second floor at 5:30 p.m. John Silverberg, attorney for the petitioners, will be there to discuss the decision and what further steps are necessary.

Encl.

253

TO: CARL RACHLIN
FROM: JIM WALRATH

Summary of appeal to Commissioner of Education Allen on school construction in East Brooklyn:

1. complainants (Negro, Puerto Rican, and White taxpayers and parents of elementary and intermediate level school children in the East Brooklyn area) demand ① that the Board of Educ. be restrained from making final site selections or awarding architectural or construction contracts on proposed "neighborhood schools" in the East Bklyn area; ② that the Bd. of Educ. take specific steps found necessary by an investigation by the State Commissioner of Educ. to desegregate and racially balance proposed and existing schools in East Bklyn. to an extent feasible in view of existing patterns of residential segregation; and ③ that the funds now appropriated for "neighborhood schools" be used instead for proposed schools of an educational park.

2. Thus far, the petitioners' demands have been refused by the Bd. of Educ. But the petition is now before the Commissioner, who has granted a stay order restraining the Bd. of Educ. from proceeding with final site selection and awarding of contracts for seven school projects. Hearing of the merits will be July 13. Counsel for petitioners is requesting an amicus curiae brief from CORE.

3. Summary of argument:
   1. "Allen Report" (by State Educ. Commissioner's Advisory Comm. on Human Relations and Community Tensions) specifically states that none of the proposed plans of the N.Y.C. Bd of Educ will contribute to desegregating the schools.

2. Allen Report's evaluation of the 1964-1970 school building program states that segregation will merely be reinforced.
3. An alternative plan, wholly realistic, of an educational park system is available to the Bd. of Educ.
4. The Bd. of Education's own study on "The Educational Park in New York City" commends the educational park idea, and even recommends the East Brooklyn area as an ideal site.
5. The Board's study cites the East Blyn area because:
    a. It's an ideal location to achieve integration in the schools while it would draw from segregated neighborhoods
    b. educational and sociological soundness
    c. land availability
    d. flexibility (large site is available)
    e. economy (the land is public-owned already)
    f. stability in racial mixture of would be preserved
    g. transportation (easy)
    h. proximity of pupils (neighborhoods border on the site)
6. The Mayor (Lindsay) and City Planning Commission have disapproved the Bd. of Education's attempts to circumvent the Allen Report proposals. But they are powerless, to delete construction items from the budget.
7. Draft Capital Budget of the City Planning Commission recommends to the Bd. of Educ. the educational park project.
8. Mayor's message to the Bd of Estimate and City Council recommended an educational park in East Bklyn.

9. Allen Report recommends desegregated schools after the fourth grade – not neighborhood schools.

News Release From City-wide Conference for Educational Parks

For Further Information call
Irving Levine at the American
Jewish Committee -- Pl 1-4000

FOR RELEASE, TUESDAY, JULY 12, 1966

New York, July 12...State Commissioner of Education, James E. Allen, will hold a hearing 2 P.M., Wednesday, July 13 in his office in Albany, on a suit brought by East Brooklyn parents against the New York City Board of Education "for failure to desegregate our schools and improve the quality of education our children receive."

Twelve civil rights organizations are joining the 31 Negro, Puerto Rican and white parents of the area in submitting an _amicus curiae_ brief appealing to the Commissioner "from the continuing action of the Board of Education of The City of New York in refusing to institute an educational park in East Brooklyn and instead continuing to construct segregated and imbalanced schools resulting in the inclusion of such schools in the Capital Budget for 1966-1967 as approved by the Mayor of the City of New York on April 20, 1966."

John Silverberg, Attorney for the Plaintiffs, says: "We are hopeful that the eventual outcome of our appeal will be the construction of an educational park in East Brooklyn. This would provide seven integrated intermediate schools, and would eliminate six existing segregated schools, and correct utilization imbalance, all at the same cost that the Board of Education would use for its plan. Under the Board's present plan, they would build three new middle schools which would be only slightly integrated, without eliminating a single existing segregated school in the area, and retain the present school utilization imbalance and the same low quality education."

Mr. Silverberg pointed out the drab environment in which the children live, "We are particularly alarmed by the posture and plans of the Board of Education of the City of New York. The children we speak of in Canarsie and Brownsville live in crowded, ugly, poorly-serviced lands and communities. There is no beauty, there is no space, there is no culture, social or recreational activities; there is no adult education, no job training center. Community facilities of any kind or description are lacking. Shopping facilities are inadequate. The purpose of the educational park would not be simply to integrate these communities with other communities, nor would it be simply to create the objectives we spoke of above, but in great measure it would be an effort to expose the young children of these communities to another way of life."

The plaintiffs in the suit are: Kate Balis, Wanswer Baltrop, Frances Brown, Luise Britt, Helen Efthim, James Fisher, Henry R. Fuller, Milton Galamison, Marguerite Gaither, Arnold Gerber, Sondra Gerber, Curtis Grace, Elizabeth Grace, Joseph Graymon, Eddie Mae Greene, Thelma Hamilton, Zedia Harrington, Jacqueline Hogan, Arlene Kirkland, John Kollock, Lena Marley, William Marley, Nathaniel Miller, Angel Rivera, Ruth Seff, Bernice Shenhouse, Hume Smith, Lillian Wagner, Fred Wilson, Rose Young.

The organizations joining in the _amicus curiae_ brief are: American Jewish Committee; American Jewish Congress; Brownsville Community Council; Catholic Interracial Council; CORE; EQUAL; Harlem Parents Committee; NAACP; N.Y. Civil Liberties Union; Protestant Council of New York; Scholarship, Education and Defense Fund for Racial Equality; Urban League of Greater New York.

Organizations and local groups supporting the appeal are: National Committee for Puerto Rican Civil Rights; Executive Committee of the Confederation for Action on Integrated Quality Education; Rev. Donald Harrington and Mr. David Livingston, co-chairmen of the Conference for Quality Integrated Education; Americans for Democratic Action; Community

Action Committee of Brownsville; Canarsie Civil Rights Committee; Canarsie Independent Democrats; Council for a Better East New York, Inc.; East New York Civil Rights Association; Flatbush Community Council; many local clergy.

The brief quotes Commissioner Allen's report on "Desegregating the Public Schools in New York City" in which he stated: "We recommend further that, as soon as possible, the middle schools should be located in educational parks so situated as to provide children in as many parts of the City as is feasible the experience of attending a genuinely integrated school during their middle school year.

"The most practical location for such schools would be in areas where a suitable number of minority group children can be drawn from existing ghetto neighborhoods into parks which will also enroll children from white neighborhoods."

The brief also quotes from a Board of Education brochure, issued in April 1965, in which is stated, regarding the East Brooklyn site: "The site which seems to meet best the criteria which have been established is located in Brooklyn, between East 100th Street and East 107th Street, and between Farragut Road and Avenue D (see Exhibit A). It is situated adjacent to four rather well-defined neighborhoods-Brownsville, Canarsie, East Flatbush and East New York."

Affidavits in behalf of the parents case are being submitted by: Rev. Eugene Callendar, Director, Urban League of Greater New York; Rev. John Collins, Pastor, Jefferson Park Methodist Church; Rev. James W. Crawford, Director, East Harlem Protestant Parrish; Mr. John Dentler, Director, Center for Urban Education; Prof. Dan Dodson, New York University, Graduate School of Education; Rev. Harold Eads, Assistant Minister, Church of the Assenscion; Rev. Norman C. Eddy, Director, Metropolitan North Citizens Committee; Community Coordinator of the New York City Mission Society; Rev. Robert A. Edgar, Pastor, Central Presbyterian Church; Mr. John Heinemeier, Member Executive Board, Lutheran Human Relations Association of Greater New York; Graydon E. McClellan, Former General Presbyter of United Presbyterian Church in the U.S.A.; Rev. James McGraw, Editor, Renewal Magazine; Rev. Robert Nichol, Minister, Community East Harlem Parrish; Rev. John Pulle, Trinity Lutheran Church; Mr. David Rogers, Center for Urban Education; Rev. Anthony Shipley, Chairman, Metropolitan District Committee for Social Action; Rev. Arthur Simon, Pastor, Trinity Lutheran Church; Mr. Neil Sullivan, Superintendent of Schools, Berkeley, California; Rev. Paul Perry Valentina, Pastor, Zion Lutheran Church; Rev. George W. Weber, Director, Metropolitan Urban Services Training Center; Dr. Max Wolff, Commonwealth of Puerto Rico.

Assemblyman Samuel Wright from East Brooklyn, who introduced a bill to provide money for educational parks, also submitted a statement to Commissioner Allen.

The parents obtained a stay order from Commissioner Allen on June 28. After the hearing on July 13, Commissioner Allen will set a date for all final arguments.

Mrs. Helen Efthim, a resident of Brownsville and a white leader in the local "Parents for An Educational Park" points out that the Board of Education was not only violating its own best technical judgment, but also conveniently looked away from a January 3 recommendation of the City Planning Commission. Mrs. Efthim quoted the Planning Commission as saying, "The East Brooklyn area was an excellent one to test the educational park concept." Mrs. Efthim said, "The non-implementation of the Allen Report's recommendation that middle schools be located in educational parks coupled with a rejection of the City Planning Commission's urging that the Board give careful consideration to the educational park proposal for this area before taking final actions on the sites of proposed schools "should in our opinion subject the entire matter to legal review."

JUL 13 1966

NEWS RELEASE FROM CITY-WIDE CONFERENCE FOR EDUCATIONAL PARKS

For Further Information call
Irving Levine at the American
Jewish Committee -- PL 1-4000

CORRECTION

In the news release sent to you dated Tuesday, July 12, 1966 concerning the East Brooklyn Parent's Suit on the educational park, the following quotation was incorrectly attributed to John Silverberg, Attorney for the Plaintiffs:

> "Mr. Silverberg pointed out the drab environment in which the children live, "We are particularly alarmed by the posture and plans of the Board of Education of the City of New York. The children we speak of in Canarsie and Brownsville live in crowded, ugly, poorly-serviced lands and communities. There is no beauty, there is no space, there is no culture, social or recreational activities; there is no adult education, no job training center. Community facilities of any kind or description are lacking. Shopping facilities are inadequate. The purpose of the educational park would not be simply to integrate these communities with other communities, nor would it be simply to create the objectives we spoke of above, but in great measure it would be an effort to expose the young children of these communities to another way of life."

PLEASE DELETE THIS QUOTE

Kalamazoo

A Report to Our Residents

Our school system, like many others throughout the [illegible] [illegible] [illegible], without a solution the problem of [illegible] [illegible] issue of "Your School" was prepared [illegible] learning, or intercultural relations may be worsened for both the present and the future."

This is precisely the condition of worsening relations we are experiencing today. A local school district, Roosevelt, in September 1966 had a 59% Negro enrollment, which is an 8.2% increase over June 1966, simply by forcing a busing program on the entire community. Their school officials have warned that this percentage can be expected to increase.

In an attempt to control the declining white population, the Board of Education of Pittsburg developed the following policy guideline:

"Forced or unnatural or irrational relocation of children shall not be imposed, whether by busing or other means. It is not the intent of the Board of Education to dislocate any children from their neighborhood, except for reasons of overcrowding, under-population, or other reasons acceptable to the Board. To remove a child by government action from his neighborhood and to place him in a different neighborhood solely to accomplish an enforced integration, which may be contrary to his family's wishes, is as serious an affront to freedom as enforced segregation."

It should be noted that racial imbalance is essentially a social and economic problem, not an educational problem. It can, however, be an educational problem, if the parent believes the educational programs, facilities, or teachers are inferior in a particular school. This was one of the complaints in the Mitchell Petition concerning the Woodfield Road School. Commissioner Allen appointed the Fischer Committee to investigate these allegations, and it was found that.

"In our visits to each of the schools we found no evidence of different educational standards."

On the contrary, prior boards throughout the years have spent considerable effort and money in this school. Improved library services and the extensive use of reading and [illegible] specialists have assisted youngsters [illegible] prior to the Federal Government [illegible]

[illegible]

I

is racially imbalanced" and that, "racially imbalanced schools *always* afford unequal educational opportunities." It must, therefore, be concluded that the Commissioner's Plan has [illegible] the educational [illegible] afforded [illegible]

[illegible]

INSERT #19

In our community, because of extremist viewpoints, a solution has not been found and the control has been lost. We believe that a solution can be found, acceptable to each parent, since he is a parent before all else. Those parents, both Negro and white, who believe in the neighborhood school will have their assignment [illegible] Those parents, both Negro and white, who have advocated [illegible] [illegible] will [illegible] have their wish. This will [illegible] [illegible] [illegible].

[illegible]

DFRE

GALAMISON, MILTON A., et al vs BOARD OF EDUCATION, NY, 1966-1967

1967

Box 36
Folder 35

istorical Society of Wisconsin

Please Retain Original Order

BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 LIVINGSTON STREET
BROOKLYN, N.Y. 11201

LLOYD K. GARRISON, PRESIDENT
ALFRED A. GIARDINO, VICE PRESIDENT
JOSEPH G. BARKAN
AARON BROWN
THOMAS C. BURKE
MORRIS IUSHEWITZ
JOHN H. LOTZ
CLARENCE SENIOR
ROSE SHAPIRO
BERNARD E. DONOVAN, SUPERINTENDENT OF SCHOOLS

Harold Siegel, Secretary

April 10, 1967

Hon. James E. Allen, Commissioner
of Education
State of New York
Albany, New York

Re: Matter of Milton Galamison, et al.

Dear Commissioner Allen:

At the hearing before you on March 14, 1967 in the above matter, the Board's report to you of February 27, 1967 was discussed. At the conclusion, it was agreed that the Board would submit to you, with copies to the petitioners, a supplementary report which would give consideration to certain points advanced by counsel for the petitioners in the course of the hearing. The supplementary report is herewith submitted. It deals, among other things, with the two requests made by the petitioners, namely:

1. That if possible all three junior high schools in Brownsville should be converted into elementary schools, to relieve the over-crowding in the latter, to avoid the building of more elementary schools in Brownsville, and to desegregate the junior high school grades in toto; that if this were not possible, then at the very least J-263 should be so converted;

for a start only!

2. That the junior high school students from Brownsville

should be sent to new, integrated schools to be built on the "Spine" along the route of the railroad, and to be located as closely as possible to the industrial park site in the Flatlands between Brownsville and Canarsie.

The following plan has been evolved after intensive studies by the Board's School Planning and Research Division and by the Integration Committee of the Board (Mr. Iushewitz, Chairman, Dr. Brown, and Messrs. Barkan, Burke and Garrison).

1. Conversion of J-263 in Brownsville Into a K-5 Elementary School

The basic difficulty with the requested conversion of all three schools (J-263, J-252, J-275) is that it would require the shifting of so many Negro and Puerto Rican students to the new schools on the Spine that to bring into the new schools at least an equal number of white students would leave the schools north and south of the Spine so extremely under-utilized as to make the project impracticable. Even the conversion of J-263 alone might present a problem of under-utilization, which will be described below. We think that this problem can be solved, but that any intensification of it by the closing of more Brownsville schools would jeopardize approval by the City authorities of capital appropriations for new schools on the Spine.

We propose the conversion of J-263, the northernmost of the three junior high schools in Brownsville, rather than either of the others because it is the most heavily segregated. As you will see from the map attached hereto as "Exhibit A", the present ethnic composition of the three schools in question is as follows:

J-263 - N - 903
P - 590
O - 14
1,507

J-252 - N - 487
P - 327
O - 224
1,038

J-275 - N - 918
P - 573
O - 209
1,700

The plan for the conversion of J-263 involves the retention of a K-5 pattern in the elementary schools and a 6-8 pattern for the junior high schools. The reasons for this are two-fold. First, if the new schools on the Spine were to house four junior high grades rather than three, the number of "others" to be assigned to them would have to be increased proportionately, which would still further accentuate the problem of under-utilization of the schools north and south of the Spine. Secondly, the added population to be included in the Spine schools would require a large increase in their members, and the combination of such an extensive building program with the under-utilization of the remaining schools would, in our judgment, make the project unacceptable to the City.

We must emphasize the fact that the future estimates of enrollment and of school utilization, on which the Board's plan outlined herein is based, contain many elements of uncertainty, due to unpredictable factors in calculating ethnic population movements, births, student mobility, shifts to suburbs and private schools, etc., and due also to the absence of any master plan for the City covering the location, character, scheduling and interrelationships of housing, commercial development, transportation, parks, recreation centers, job-training centers, and schools. The Board has long urged the necessity of comprehensive planning of this sort by the City. Given the uncertainties, the plan herein outlined, if it were adopted, would obviously have to remain subject to adjustment from time to time to meet changing conditions.

2. Building of at Least One More Elementary School in Brownsville for the K-5 Grades

With the elementary schools in Brownsville remaining on a K-5 basis for some time to come, it will be necessary, in order to accommodate the K-5 grades, to build at least one more elementary school in addition to converting J-263, and in addition to building P-245 and P-347, which are currently in the capital budget for construction money.

3. Planning of Additional Schools for Pre-Kindergarten Children

In order to provide a full pre-kindergarten program for approximately 3000 children, additional class-room space equivalent to three new elementary schools would need to be built. It is possible, however, that a number of these children could be accommodated in dual-occupancy structures to be built by the New

York City Educational Construction Fund, combining pre-kindergarten, and perhaps kindergarten classes, with housing -- small-scale structures which could be built relatively quickly and financed in whole or in part by tax-exempt bonds. It is possible also that some of these structures might include first grade classes on an experimental basis. The development of such a plan is being actively pursued by the Fund. Possible rental space in Brownsville for both kindergarten and pre-kindergarten classes has been diligently sought by the Board of Education during the past several years, with the active assistance of the Local School Board and parent groups. It is believed that, with perhaps some small exceptions, all the space that can be had which would meet the standards required by the Fire Department, the Building Department and the Board of Health, has been located, and that new space must be built if the needed classes are to be accommodated.

4. Assignment of the Overload of Brownsville Junior High Students, Grades 6-8, to New Schools on the Spine

The estimates of future enrollments in Brownsville and surrounding communities have been carefully reviewed by the statistical staff. On a grade 6-8 basis, the excess of enrollments over capacity in Brownsville (referred to as "overload") by 1971-72 is estimated to be in the neighborhood of 4,150 students, including J-263. With the discontinuance of J-263-K the intermediate school capacity in Brownsville will be reduced by 1,300 and the

We have no more obligation to reduce overload than Bd does. We put in same # of schools + give same relief.

overload from Brownsville will then be 5,450 pupils in the 6-8 grades. This overload will go to the new schools on the Spine.

In view of the continuing decline of "Others" population in Brownsville, it seems appropriate to assume that by 1971-72, only a very small percentage of this enrollment will be "Others."

5. Building Seven New Junior High Schools on the Spine and Integrating Them by Transferring "Others" from Existing Schools North and South of the Spine

As stated above, it is proposed to send all the overload of Brownsville students to the new schools on the Spine. This will simplify the travel pattern for Brownsville students and will help Brownsville parents to identify as a community with the schools along the Spine.

The areas of pupil population of the new Spine schools would be confined generally to the communities of Brownsville, Canarsie, and Midwood-Flatlands, with smaller numbers of pupils from the southerly portion of Flatbush-East Flatbush, the easterly section of Borough Park, and the northerly section of Sheepshead Bay (see Exhibit A).

The Board believes that to promote stability the new Spine schools should have an ethnic ratio of not less than 55% "Others" to 45% Negro and Puerto Rican. To accomplish this it is planned to assign to the Spine schools a number of students from Borough Park, as stated above. This would involve territory west of Brooklyn College, which the Sargent report contemplated as the westward anchor of the Spine; it is believed, however, that this step is desirable.

Set forth in Exhibit B attached hereto is a schematic drawing showing the assignment to the Spine schools of 5,450 students from Brownsville (the 1971-72 overload previously referred to), and the assignment of a total of 6,580 "Others" from the schools in the areas described above.

The schematic drawing does not specify the particular sending schools in the several areas, or the numbers of the students to be sent from each to the Spine. It would seem premature to go into such details at this stage.

The schematic drawing assumes that all of the children from Brownsville would be Negro and Puerto Rican, and that all of the children from the sending schools would consist of "Others." In actual practice the assignments would not be made on an ethnic basis; this is never done. However, since 90% of the overload from Brownsville would in fact be Negro and Puerto Rican, and since the composition of the other sending schools consists overwhelmingly of "Others", the actual resulting overall ratio for the schools on the Spine should approximate the 55%: 45% shown on Exhibit B.

As Exhibit B shows, the population of the new Spine schools would be approximately 12,000. This would call for seven new junior high buildings.

6. Dealing With the Vacancies Which Would Arise in the Sending Schools Outside Brownsville

The approximate vacancies as of the school year 1971-72 which would result in the contemplated shifting of students outside Brownsville to the new schools on the Spine would result in estimated vacancies as follows:

In Borough Park	700
In Flatbush-East Flatbush	800
In Midwood-Flatlands	2,600
In Canarsie	1,150
In Sheepshead Bay	370
Total	5,620 *

These vacancies would be equivalent to the total capacity of more than three junior high schools of grades 6-8. It will readily be apparent that any further increase in vacancies, as by enlarging the numbers of grades that would shift from Brownsville to the Spine, or by converting either or both of the remaining

---

*This is a somewhat lesser total than the number of students to be moved from the above areas to the Spine (6,580). The reason for this is that vacancies in any given school are computed by deducting total enrollment from the normal "capacity" of the school; and in certain schools where the enrollment exceeds capacity, "vacancies" do not arise until the number has been reduced below the "capacity" figure.

junior high schools in Brownsville into elementary schools, would make the vacancy problem insuperable. If the schools outside of Brownsville were obsolescent the problem might be solved by closing some of them; but they are in fact relatively new and in good condition.

How then would we deal with the 5,620 vacancies? Hopefully, by some or all of the following steps:

(a) Increased enrollment through new housing.

The Linear City concept, as envisaged in the Sargent report to the Board, and by the Mayor, contemplates the construction along the Spine of new housing, community facilities, and commercial developments, as well as new schools and perhaps other educational institutions such as a science center, an art center, a community college, etc. -- all to the end of stabilizing and enriching the whole area.

With developments of this sort, the school population of the area should be materially increased.

The New York City Educational Construction Fund will be considering the possibility of combining some of the new schools with housing as dual occupancy structures, and these possibilities will be explored without waiting for the City's plans to be finished -- but always with the maximum degree of communication and cooperation between the Board of Education and its architects and educational advisers on the one hand, and the City Planning Commission and other interested city agencies on the other hand.

Converting 68 to Elementary to relieve elementary overcrowding

(b) Converting one of the sending schools into a High School Annex

~~A new~~ high school is to be erected adjacent to the Spine east of Brooklyn College, and an Annex to it might well be considered, due to the great need of high school space.

(c) Converting one of the sending schools into a Community College.

The Sargent report mentions the possibility of a new community college to be built at the eastern terminus of the Spine close to the Flatlands Industrial Park. There is the further possibility of a conversion of one of the sending schools near the western end of the Spine into a community college. These possibilities will of course depend on the plans and desires of the Board of Higher Education, and will have to be explored with that Board.

(d) Miscellaneous steps.

A reduction in class size in the sending schools, or an increase in their open enrollments, or the addition to them of the 5th grade, resulting in smaller elementary enrollments (which might in turn be supplemented by an increase in pre-kindergarten and kindergarten enrollments) -- some or all of these steps might help to absorb the vacancies.

In general, the Board is hopeful that the filling of the vacancies could be accomplished to the benefit of the educational system, although it cannot be guaranteed.

7. Locating the New Schools on the Spine, and Providing Pupil Transportation

We recognize the desire of the petitioners plaintiffs to bunch the new schools as near to Brownsville as possible. However, we believe that the Linear City concept can best be achieved if the various housing, community, commercial and educational elements are spaced at intervals along the Spine, so as to upgrade and invigorate the whole area. Exhibit A gives a rough idea of the proposed location of the seven new schools, two of which would be in the area very close to Brownsville.

Transportation under the fully developed Linear City, as now contemplated by the City and the Board, would consist of a rapid transit electrically controlled shuttle system, which would take students and other people living or working on the Spine to and from their schools, residences and offices. The Board of Education is hopeful that arrangements could be made with the Long Island Railroad for student travel along the Spine if the shuttle system were for any reason delayed -- or even if it should fall through altogether. One advantage of the Linear school concept is that it could be carried through -- hopefully with some housing under the New York City Educational Construction Fund -- even if the total Linear City plan failed of achievement.

8. The East New York Educational Park

The School Planning and Research Division believes that the development of an educational park in the Spring Creek area to serve the East New York neighborhood of Brooklyn and part of western Queens (see Map - Exhibit C) presents the most hopeful solution to the problem of furthering integration in those areas.

—North not South—

Any attempt to combine the enrollment of the rapidly changing ethnic school population in East New York with that of Brownsville would result in an overwhelming imbalance. It is therefore deemed best to combine the overload enrollment from East New York with that of a section of southwest Queens (largely "Others" in character.) In view of the relatively small combined area to be served the concentration of facilities in an educational park has seemed indicated.

The plan for the Park involves the use of land in the vicinity of Spring Creek, which forms part of the southern boundary lines between the boroughs of Brooklyn and Queens. Relatively large tracts of unencumbered land are available in this vicinity, including Site #1 in the area west of Spring Creek in Brooklyn (approximately 42 acres) and Site #2 east of Spring Creek (approximately 60 acres.) *

The projected (1971-72) overloads of intermediate school enrollments in grades 5-8 are as follows:

From East New York - - - - - - approximately 3,000 students (1,000 "Others"; 2,000 Negro-Puerto Rican.)

From western areas of Woodhaven-Richmond Hill and Richmond Hill-South-Ozone Park-Howard Beach - approximately 2,400 students (2,300 "Others"; 100 Negro-Puerto Rican)

The combined enrollment capacity required for intermediate school pupils will be approximately 5,400. There are two projects in Brooklyn and one in west Queens having current budgetary status which could serve to supply these essential accommodations; I.S. 361-K, 366-K and I.S. 212-Q. It is expected that the ethnic distribution

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*See Exhibit D

will be maintained at approximately 60-40 upon the initiation of this project. (See Exhibit D.)

In addition to the intermediate school installations a new high school is required to serve the East New York community. This installation should become a part of the Spring Creek Educational Park thus raising the pupil capacity of the Park to approximately 9,400 in grades 5-12.

9. Procedural Considerations and Next Steps

The Board trusts that the above plan, while it does not include all the details which would be required for a finished product, will prove sufficient for your present purposes.

The plan has not been subjected to the test of scrutiny by Local School Boards and other community groups, nor could it be implemented without public hearings. The Board of Education has hesitated to take these steps until certain that the plan would meet with your approval in this litigation. In presenting the plan to the public the Board would of course stress the educational benefits which are expected to flow from the Linear City concept, as well as the cultural and economic benefits which would accrue to the entire area. These have been touched upon in the Sargent report and in the joint press release issued by the Mayor and the President of the Board, copies of which I sent you in my letter of February 27, 1967. They deserve expansion and emphasis.

Notwithstanding what seem to us to be the exciting and creative potentials of the plan, it is possible that as a result of its subjection to the processes of local discussion and city-wide public hearings, and as a result of further study by the Board, the Board may wish to propose modifications of or additions to the plan for your approval. The building program in the affected parts of Brooklyn and East New York is already retarded, and the Board has no purpose other than to press forward with a sound and workable plan, but we cannot in the interests of expedition dispense with the essential forms of community consultation and discussion.

Meanwhile we earnestly request that your stay against further school construction in the Brownsville area be lifted. We urged this in our report of February 27, 1967; any further delay in lifting the stay order would be gravely prejudicial to the best interests of the school system. Let me briefly summarize the situation.

P. S. 347 and 245 are now in the budget for construction money for the school year 1966-67. The plans for P. S. 347 are completed; its site has been authorized; but until the stay is lifted the Board cannot go forward with site acquisition. The plans for P. S. 245 were approximately 60% completed at the time of the stay on June 24, 1966, and have been at a stand-still ever since.

These two schools are needed, along with two other elementary schools (P.S. 237 and 301, which are in for "A" and "B" money respectively), to relieve overcrowding and to afford adequate space for the K-5 grades.

If J-263 is converted into an elementary school, as the above plan calls for, one of these two schools -- presumably P. S. 301 -- could be eliminated. However, as stated previously in this report, if we are to complete our kindergarten enrollments and provide for the needed pre-kindergarten classes, we should go ahead with the construction of P. S. 301, even if J-263 is converted, and in addition provide space equivalent to two more elementary schools.

As suggested above in this report, if the New York City Educational Construction Fund can build pre-kindergarten and kindergarten space in small units for dual occupancy with housing, it may be possible to dispense with some portion of this additional space; but at this moment the matter has not proceeded far enough to justify any exact predictions. The point is that, regardless of the outcome of this litigation, the stay should be lifted because the projected elementary school space should be used in any event, either for the purposes outlined above, or as replacement for obsolescent buildings for the Brownsville area, or both.

Form of Order Requested

We respectfully ask for an order which in substance would provide as follows:

1. The plan outlined in the report of the President of the Board of Education to the Commissioner of Education dated April 10, 1967 is approved in principle, and the Board is authorized to proceed immediately with the public

discussion of it as outlined in that report;

2. The Board is directed to submit to the Commissioner any modifications of or additions to the plan which after such public discussion it may deem to be in the best interests of the school system;

3. The stay against further school construction in Brownsville which the Commissioner issued on June 24, 1966 is hereby rescinded.

We are delivering copies of this report to counsel for the petitioners. If you should desire to hold a further conference with the parties before issuing your order we shall of course be glad to participate; we urge that any such arrangements be speedily concluded.

Respectfully yours,

Lloyd K. Garrison

Lloyd K. Garrison, President
Board of Education of the City
of New York

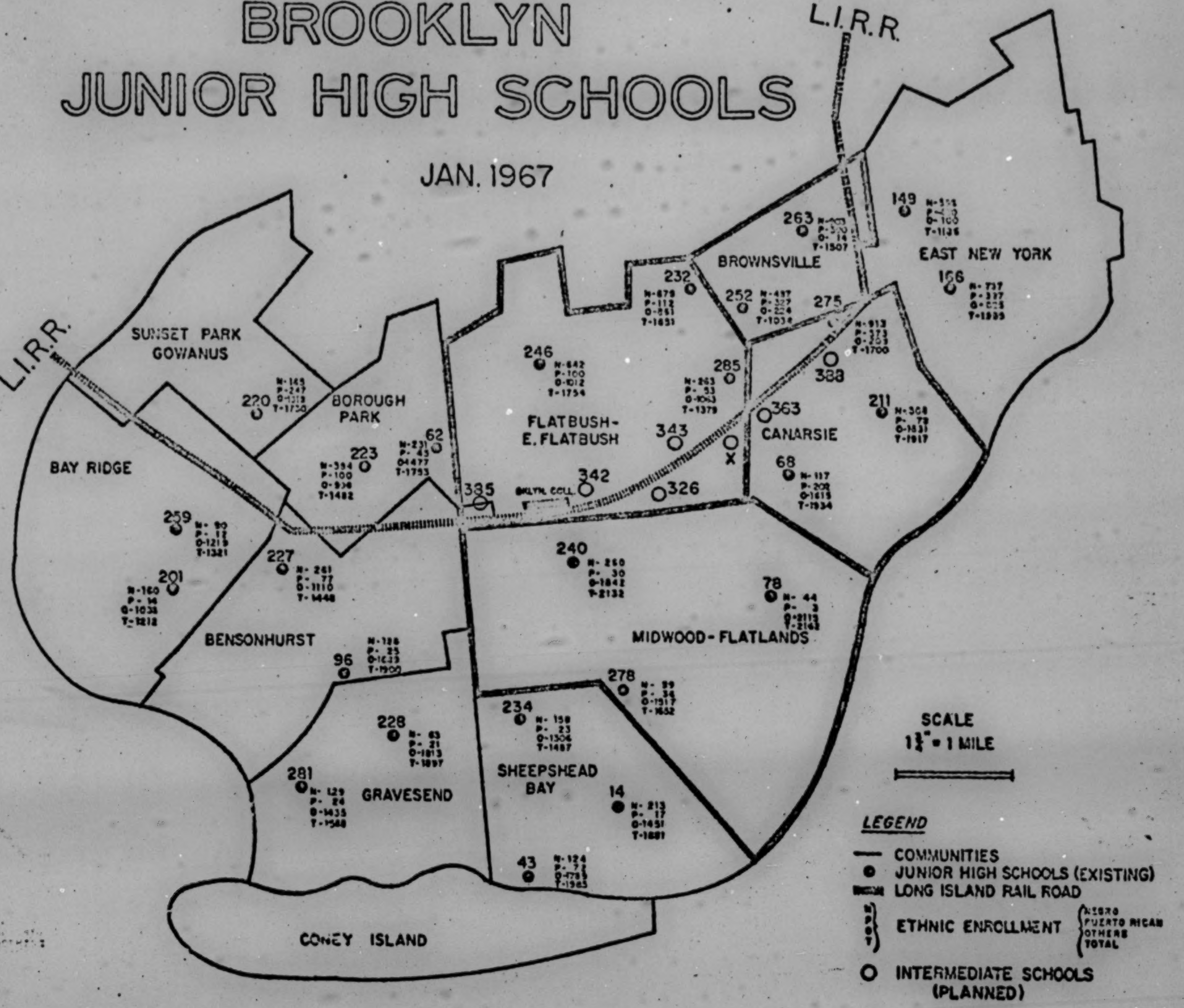
LKG/tm

Enc.

CENTRAL & SOUTH BROOKLYN JUNIOR HIGH SCHOOLS

EXHIBIT A

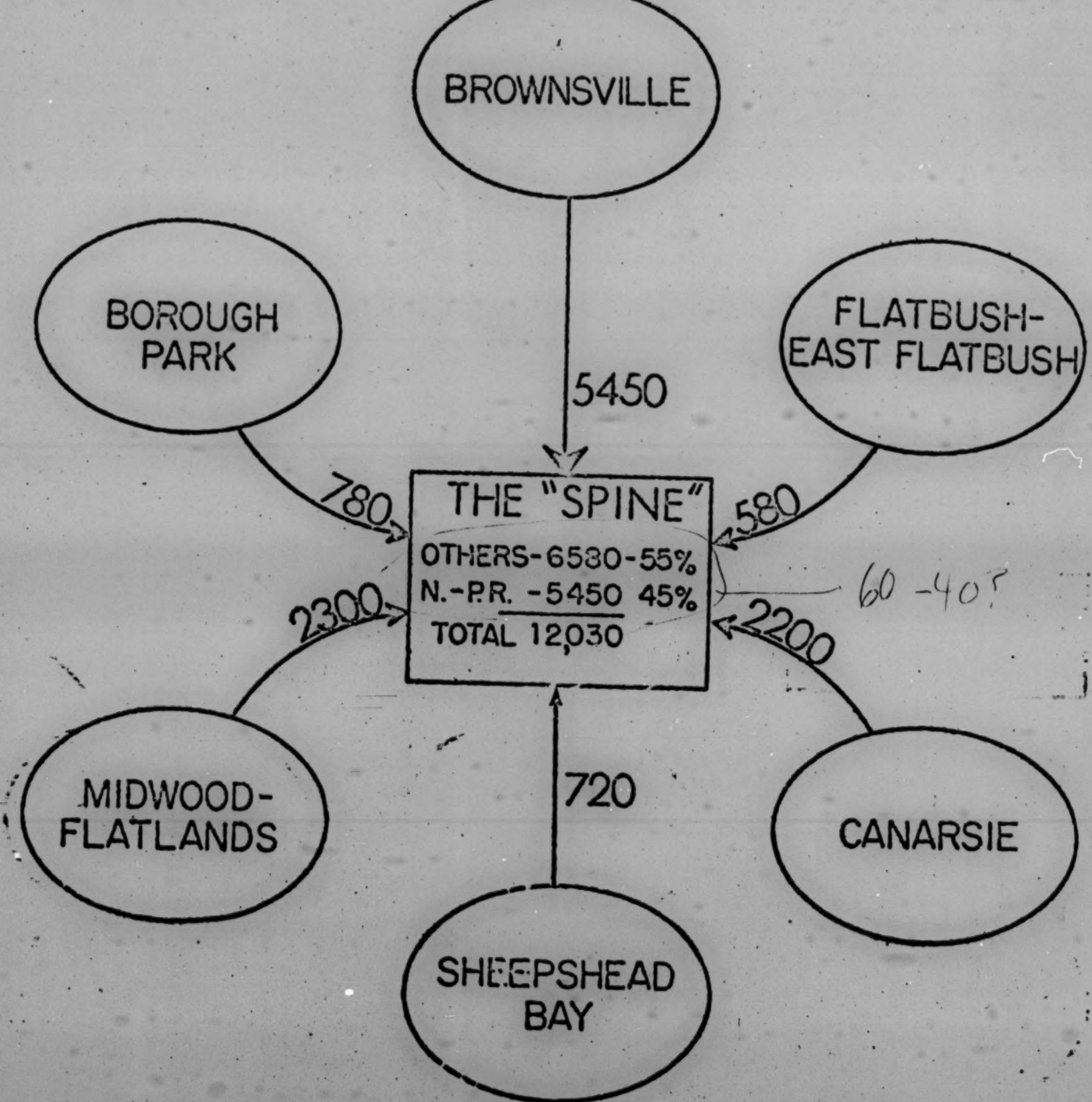
JAN. 1967


L.I.R.R.
L.I.R.R.
SUNSET PARK GOWANUS
220 N-145 P-247 O-1318 T-1730
BOROUGH PARK
223 N-394 P-100 O-938 T-1482
62 N-231 P-45 O-1477 T-1753
BAY RIDGE
259 N-90 P-12 O-1219 T-1321
201 N-160 P-14 O-1038 T-1212
227 N-261 P-77 O-1110 T-1448
BENSONHURST
96 N-186 P-25 O-1623 T-1900
FLATBUSH-E. FLATBUSH
246 N-642 P-100 O-1012 T-1754
232 N-679 P-112 O-851 T-1651
285 N-263 P-53 O-1063 T-1379
343
342
BKLYN. COLL.
326
335
X
BROWNSVILLE
263 N-903 P-590 O-14 T-1507
252 N-487 P-327 O-224 T-1038
275 N-913 P-373 T-1700
388
EAST NEW YORK
149 O-100 T-1136
166 N-737 P-337 T-1939
CANARSIE
363
211 N-308 P-78 O-1531 T-1917
68 N-117 P-202 O-1615 T-1934
MIDWOOD-FLATLANDS
240 N-260 P-30 O-1842 T-2132
78 N-44 P-3 O-2113 T-2161
278 N-39 P-34 O-1317 T-1652
GRAVESEND
228 N-63 P-21 O-1813 T-1897
281 N-129 P-24 O-1435 T-1588
SHEEPSHEAD BAY
234 N-158 P-23 O-1306 T-1487
14 N-213 P-17 O-1451 T-1681
43 N-124 P-72 O-1789 T-1985
CONEY ISLAND
SCALE
1¼" = 1 MILE
LEGEND
COMMUNITIES
JUNIOR HIGH SCHOOLS (EXISTING)
LONG ISLAND RAIL ROAD
N P O T
ETHNIC ENROLLMENT
NEGRO
PUERTO RICAN
OTHERS
TOTAL
INTERMEDIATE SCHOOLS (PLANNED)

NOTE: INTERMEDIATE SCHOOLS DESIGNATIONS ALONG THE "SPINE" ARE FOR IDENTIFICATION PURPOSES ONLY. THE ACTUAL INSTALLATIONS MAY BE IN DIFFERENT LOCATIONS AND FORMS.

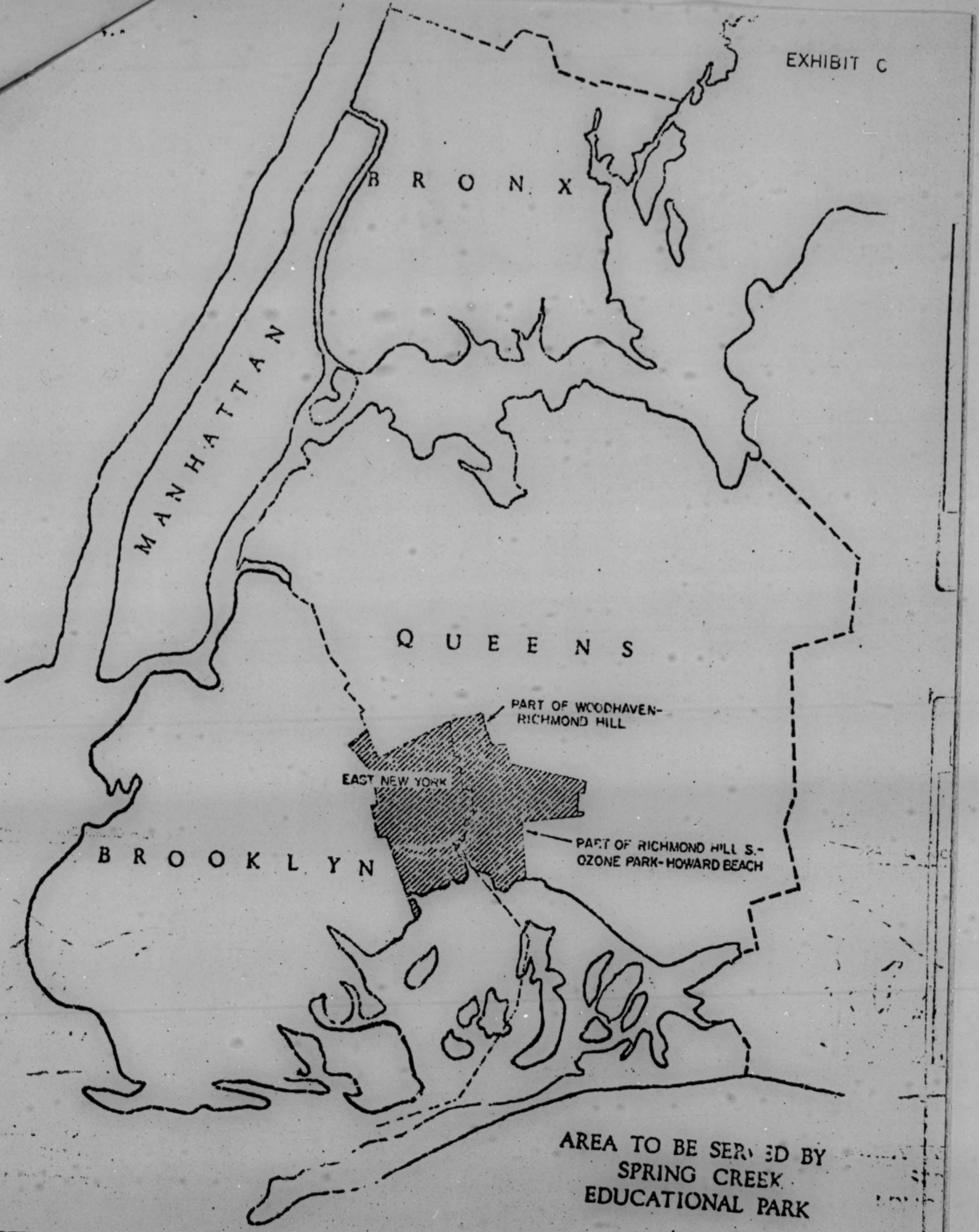
EXHIBIT B

THE LINEAR CITY SCHOOL PLAN

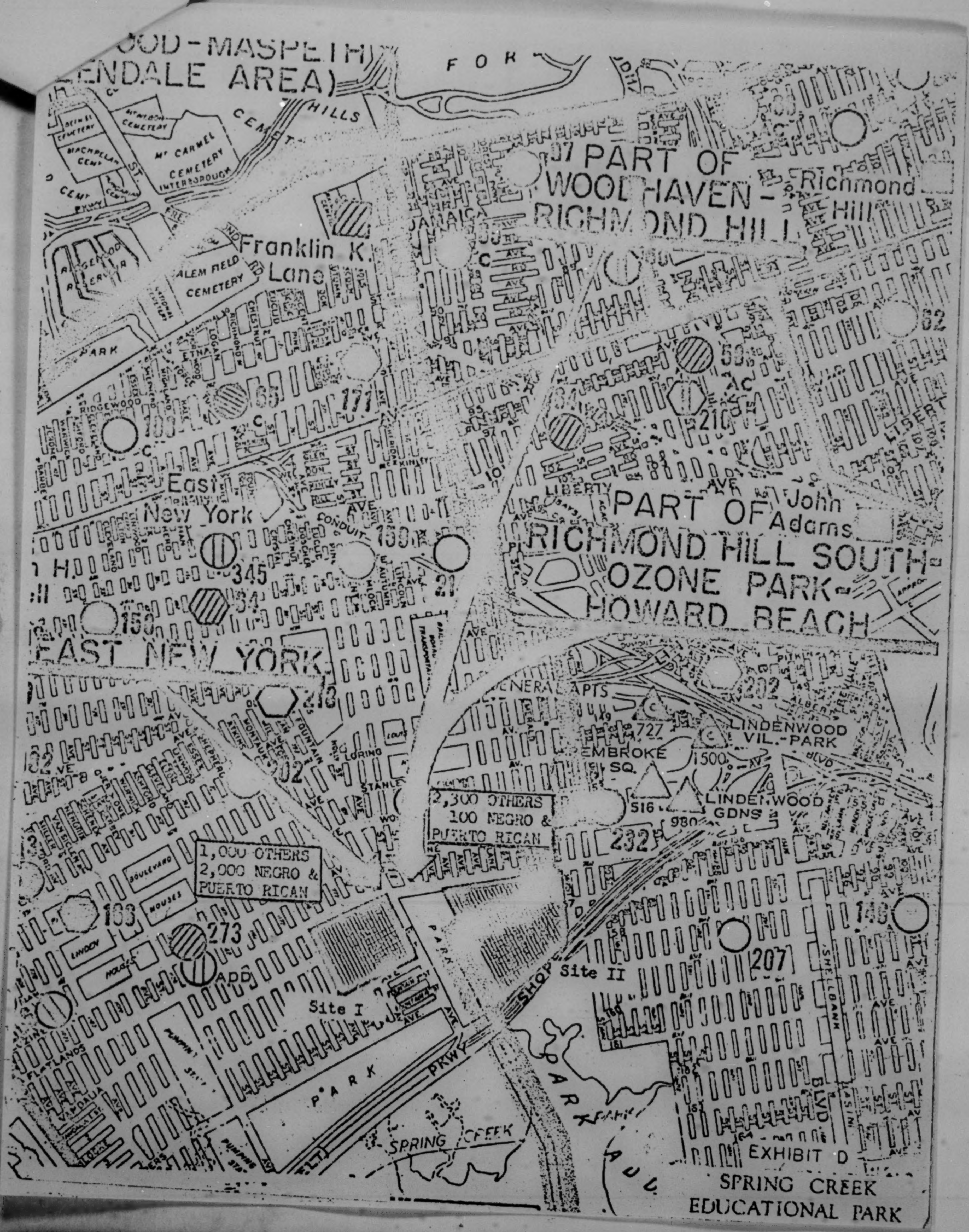

BROWNSVILLE
5450
BOROUGH PARK
780
FLATBUSH-EAST FLATBUSH
580
THE "SPINE"
OTHERS-6580-55%
N.-P.R. -5450 45%
TOTAL 12,030
2300
2200
MIDWOOD-FLATLANDS
720
CANARSIE
SHEEPSHEAD BAY

60 -40?

EXHIBIT C


BRONX
MANHATTAN
QUEENS
PART OF WOODHAVEN-RICHMOND HILL
EAST NEW YORK
BROOKLYN
PART OF RICHMOND HILL S.-OZONE PARK-HOWARD BEACH

AREA TO BE SERVED BY SPRING CREEK EDUCATIONAL PARK



OOD-MASPETH
ENDALE AREA)
FOR
HILLS
MT CARMEL CEMETERY
INTERBOROUGH
PARK
Franklin K. Lane
SALEM FIELD CEMETERY
PART OF WOODHAVEN - RICHMOND HILL
Richmond Hill
JAMAICA
LIBERTY
East New York
CONDUIT
345
150
177
210
21
82
PART OF RICHMOND HILL SOUTH-OZONE PARK-HOWARD BEACH
John Adams
EAST NEW YORK
213
202
GENERAL APTS
727
1500
LINDENWOOD VIL.-PARK
PEMBROKE SQ.
516
980
LINDENWOOD GDNS
232
2,300 OTHERS
100 NEGRO &
PUERTO RICAN
1,000 OTHERS
2,000 NEGRO &
PUERTO RICAN
BOULEVARD HOUSES
LINDEN HOUSES
273
ADD
183
Site I
Site II
207
146
SHORE PARK PKWY
PARK
SPRING CREEK
FLATLANDS
PUMPING STA
SHELLBANK
BLVD

EXHIBIT D

SPRING CREEK EDUCATIONAL PARK

JOHN E. SILVERBERG
ATTORNEY AT LAW
15 PARK ROW
NEW YORK 38, N. Y.
—
BEEKMAN 3-7990

May 3, 1967

Hon. James E. Allen
Commissioner of Education
State of New York
Albany, New York

Re: Matter of Milton Galamison, et al

Dear Commissioner Allen:

Ten months ago on June 20, 1966, the Board of Education (Adrian Blumenfeld affidavit of that date) stated that it planned to build the seven schools which on June 24, 1966 fell under the Commissioner's stay order, preventing final site selection and/or construction. On April 10, 1967, ten months later, Mr. Garrison requests the Commissioner to lift the stay order to permit the Board, incredible as it may seem, TO BUILD THE SEVEN SCHOOLS ON EXACTLY THE SAME SITES, as follows:

Primary schools - 245, 347, and 237 at specific sites in Brownsville have always been requested at the sites noted in the 6/20/66 affidavit

Primary school 301 did not have a specific site on 6/20/66; on 4/10/67, the Board admits that this school would be made unnecessary if JHS 263 were converted to elementary school space, but requests that it be allowed to build that school somewhere in Brownsville anyway. However, the City has refused to provide for this school.

continued...

I.S. 363 listed for Foster and Farragat Avenue in Canarsie on 6-20-66 appears at the same location on the "schematic" sketch, Exhibit A in the 4-10-67 document.

I.S. 326 listed for E. 39th or 40th, Ave. I, J, or K on 6-20-66; appears in the same area in Midland-Flatlands, fully three miles away from the Brownsville school it is to relieve, in the 4-10-67 document.

I.S. 366 listed for Flatlands Avenue and Fountain Street on 6-20-66 appears again at precisely that same intersection in Exhibit D 4-10-67

It is extraordinary that the Board, after ten months of litigation, hiring of experts to study and make proposals, hearings and drafting of lengthy affidavits, requests for many delays to permit further study and refinement of plans, would dare to come before the Commissioner with precisely the same construction plan that was the cause of the suit in the first place. We consider this action to be in contempt of the order of the Commissioner dated 9-30-66 which called for the submission of "new plans" and evidence of the Board's absolute, arbitrary and capricious intransigence in the maintenance of their practice of extending segregation under the cloak of a policy of promoting integration.

Feeder patterns of the 7 schools

Although the location of the schools stayed are identical with those proposed in June, 1966, there are a few changes in the feeder patterns proposed.

In June , 1966 in the Adrian Blumenfeld affidavit, I.S. 326

was to receive a total of "roughly 600 children" (p. 10) graduates of elementary schools now feeding I.S. 263 and 275 in Brownsville, I.S. 363 was to receive about 550 children (p. 8) presently attending those two segregated intermediate schools in Brownsville, a total of about 1150 children.

Secondly, Mr. Blumenfeld swore that in the case of 363, delay in providing funds for the construction of that school "designed primarily for children in the Canarsie community," (p. 9) "will seriously delay the conversion of the school system to a Grades 4-4-4 plan of organization to which the Board of Education is committed in order to achieve excellence in education and improved racial balance in the city's schools -- particularly in the intermediate schools." (p. 9) Similarly, in the case of 326, Mr. Blumenfeld states that "I.S. 326 is designed primarily for children in the Midwood-Flatlands community," (p. 10) and is "an integral part of a master plan to provide middle school facilities to implement the reorganization of the grade level structure of the school system. The policy of the Board of Education is the ultimate establishment of a Grades 4-4-4 plan of organization to promote excellence in education and improved racial balance in the city's schools -- particularly in intermediate schools." (p. 10).

continued.....

How does this zoning compare with that proposed by Mr. Garrison on 4/10/67?

1. The 4-4-4 plan is outrightly scuttled, thereby eliminating forever the bringing up of the fifth grade into either of these schools. This eliminates one fourth of the population from Brownsville that would be accomodated under the earlier plan.

2. Instead of bringing in the children from the three segregated Brownsville intermediates, the new plan proposes that 1300 children now attending I.S. 263 would be brought in - though not necessarily at once, some may have to wait until other schools are built along the spine - this point is not specified in Mr. Garrison's letter. However, even if all were to come to the first two schools, this would constitute a total increase of 150 children from Brownsville over and above those proposed last June. However, since no fifth graders would come, there would be an eventual loss of seats in these two schools for Brownsville if the earlier plan really intended bringing in the fifth graders as quoted above.

It is depressing to remember that in his affidavit of 11/23/66, Mr. Garrison's main point was that Brownsville was desperately overcrowded to which we responded that our plan brought out the fifth graders immediately. By 4/10/67, all this overcrowding

continued.......

is forgotten and the fifth graders are permanently kept in Brownsville.

In sum, then, the zoning changes from 6-20-66 to 4-10-67 add up to a total of 150 more 6-8th graders from Brownsville accomodated in the new schools and a whole population of 5th graders being kept back. On the whole, this reflects a retreat from the degree of integration proposed last June and rejected by the Commissioner.

We deny that the conversion of I.S. 263 represents a concession to our desire to roll back existing segregation from the 5th grade up in all of the schools of East Brooklyn. Our proposal at the March 14th hearing was that as a start, the existing available funds be used to close down one black and one white school, one in Brownsville and one in Canarsie and to construct them as a unit in the area between the two areas with a single administration and central shared facilities, either a science center or art or language center to act as the core of a linear educational park that would attract support from both Brownsville and Canarsie because of the new high quality of education and innovation it would promise. It would just be the first step.

continued..

Mr. Garrison's prop[illegible]l to cl[illegible] 263 [illegible] an intermediate school is a final step as h[illegible] plains [illegible]is 4[illegible]67 document. No further conversions or c[illegible]ing of im[illegible]nced [illegible]ools,black or white are to be considered[illegible]

Here as elsewh[illegible] [illegible]al [illegible] reati[illegible] appearance of a concession, proposes a [illegible]le [illegible] ncession in form only/which retains the sub[illegible]nce o[illegible] intransigen[illegible] segregation policy.

In this instance, the form [illegible]eded [illegible] the conversion of IS 263; the substance retained is th[illegible]ar f[illegible] intermediate school children (5-8th grade) from Brownsvill[illegible] [illegible]ll [illegible] the new schools than in the original proposal of 6/20/66.

Linear City

The Board may admit that their present plans for the seven schools are identical with the rejected June 1966 proposals but will argue that the matrix in which these schools are to be set, i.e. the concept of Linear City, is a great advance.

*This is precisely the same practice described in the Efthim affidavit annexed to the original petition....by which I.S. 275 was built where it could be integrated and then zoned for segregation; when forced to rezone, the Board deliberately zoned a small minority of whites rather than the 50-50 zoning that was normal considering the site of the school, with the result that I.S. 275 is a segregated school. Another example is Coop City, where a concept designed to promote desegregation and a new high level of education is adopted in words but scuttled in practise by building in an all-white area very far removed from the segregated schools of the ghetto. Another example is I.S. 201, one of the first new schools to promote the 4-4-4 plan for integration, built in a totally segregated area. Another example is Andrew Jackson High School, deliberately underutilized to avoid bringing white children across the Jamaica Avenue color line.

continued....

We responded with high hopes to the Sargent proposal for an "overall linear school where it would be possible to provide outstanding centers for such fields as science, the arts, and technology" (p. 19 Sargent report). Such a system of schools, he said, "...would permit a student to spend part of or a full day or perhaps a month at a humanities, science or social science center or at whatever facility and for whatever length of time required by his individual needs." (p. 20 Sargent report).

We should have known better. The proposals made by Mr. Garrison on 4-10-67 are an insult to his consultant, to the parents of Brownsville and to the high City officials who were induced to join Mr. Garrison in a public endorsement of the idea.

The vague little sketch submitted as Exhibit A in the 4-10-67 unsworn letter calls for the construction somewhere or other of five new intermediate schools reaching in their zoning clear across the Borough of Brooklyn to schools reaching in their zoning clear across the Borough of Brooklyn to include Boro Park in West Brooklyn. In case we might conclude that this vague sketch does actually represent some thought that the schools might be built where they are marked the exhibit cautions"Note: INTERMEDIATE SCHOOLS DESIGNATIONS ALONG THE 'SPINE' ARE FOR IDENTIFICATION PURPOSES ONLY. THE ACTUAL INSTALLATIONS MAY BE IN DIFFERENT LOCATIONS AND FORMS."

This is the plan for which we have waited ten months

continued...

on the basis of which the Board asks the Commissioner to remove the stay.

Each of the schools is to be a self-contained junior high school. There is no intent to have them form a "linear school" under a single head with central facilities or division of purpose. They are simply scattered site neighborhood, self-contained schools. There is a vague reference to the possibility that at some future date, someone else will someday build a science center, but the Board rejects all responsibility for making this the great unified, educational center that is the essense of our educational park plan or of Dr. Sargents "linear school."

They are just five neighborhood schools, built in white neighborhoods to serve white children and into which a few children from Brownsville will ultimately be bussed. So little significance was attached to the Linear City Plan that it never even came up to a vote by the Board of Education.

How gross the deception is can be gauged by the far greater specificity of the proposal for the Spring Creek educational park which is placed in a solid white community where intense construction of middle-income white housing is expected,-another Coop City educational park designed primarily to encourage the sale of real estate for white occupancy with the comeon of a new high quality

continued.....

education system "safely" integrated.

The Board of Education now has available to it $10,500,000.00, which by 7/1/67, will be increased to $10,920,500.00 for the construction of schools to serve East Brooklyn, - money saved to it by the stay order. It chooses to spend this money in exactly the same way it always intended to -- to protect the Linden Blvd. color line. What reason have we to believe that money coming to them in the future for the five other intermediate schools would be used for any better purpose?

The letter of 4/10 still presents no plan for the Commissioner to weigh against the plan proposed by the petitioners. The order of 9-30-66 has not been obeyed, despite the many delays generously permitted by the Commissioner.

As for the other matters dealt with in Mr. Garrison's letter, it is only with the greatest reluctance that we address ourselves to a serious discussion of them, to wit: the spectre of underutilization "north and south of the track" wherever that might be, and the need to provide space in Brownsville for pre-kindergarten children five years hence.

We ask the Commissioner to recall that at each step in these proceedings, petitioners have studiously responded in good faith to every red herring drawn across the trail by the Board to

continued....

confuse and obfuscate the central issue,-- where to place seven schools to achieve maximum desegregation of 5th to 8th graders in East Brooklyn.

The Board's first affidavits raised the spectre of frighful instability in the four-community area of East Brooklyn. We responded to this fraud and were further sustained by the Board's own expert. That issue was then dropped and not referred to in subsequent affidavits.

In the second set, the Board's problem seemed to be the growing overcrowding in the Brownsville area with the spectre of increasing birth rates and projected school enrollments far beyond the reach of existing construction plans. We exorcised this spectre. It seems that live births were in fact declining somewhat by the Board's own figures. (In truth, even the present enrollment in the schools of Brownsville show much less overcrowding and even some underutilization is forecast for next September with the opening of new schools. The Board is responding to this by bringing back into Brownsville many of those children out on open enrollment in underutilized East Flatbush schools, against the wishes of their parents.)

The most unconscionable diversion of all was the pretense of endorsement of the Linear City proposal, presented to the

continued...

Commissioner as a plan and announced to the public, but never taken seriously enough to be voted on by the Board.

Now all of these old issues are dropped and two new problems raised:

the pre-Kindergarten population in Bronsville in 1972 and the underutilization of unspecified schools in remote areas of Brooklyn.

On the latter point. We never asked the Board to bring children from Sheepshead Bay, Boro Park, Flatbush or Midwood into the picture and can scarcely take seriously any resultant underutilization of already underutilized schools that they may choose to select. It is ridiculous for them even to consider going so far afield to provide integrated education for East Brooklyn. Clearly those areas must be brought together with other concentrations of Negro and Puerto Rican children in Bedford Stuyvesant and Brooklyn Heights-Gowanus if borough-wide integration is to be achieved.

We are concerned here only with the populatinn of East Brooklyn including Brownsville and Canarsie, which together will comprise 80 percent of the educational park we proposed in Stage 1 and 77 percent of the park at the end of Stage 2 (see Stein affidavit p. 7, July 12, 1966). The reminder of the park population will come from nearby East Flatbush on the west and nearby East New York on the east.

continued....

We return after all this wandering to the original plan proposed by the Board of Education in April, 1965 detailed more fully in the Efthim affidavit of July 11, 1966. This plan will fully roll back segregation in East Brooklyn from the 5th to the 8th grade without drawing upon other areas. Their problems of underutilization are entirely outside of the scope of these proceedings and were hurriedly interjected in the three weeks of"intensive" study for the first time and we trust the last.

The only relevant datum is the estimated 1150 vacancies listed for Canarsie on p. 8 of the unsworn Garrison letter of 4-10-67. We confess that we have no conception of how the Board arrived at this astounding figure - nor does Mr. Garrison provide any clue as to how so precise an estimate for 1971-72 was made or in which schools the underutilization would appear. In view of the present high degree of overcrowding in some of the Canarsie schools, one would wish some explanation would have been offered.

Even should there be the remote possibility of such a vacancy figure, the original proposal of the Board in April, 1965 to use vacant I.S. schools in Canarsie for high school annex space and conversion to elementary school use appears (see p. 7 of Exhibit F to petition herein) to be a sound solution.

continued......

As for the pre-Kindergarten program for which we are now asked to provide space by 1971, it is fraught with so many "ifs" that it is difficult to believe the Board considers it a serious response to our educational park plan. "If all the children born in 1965 survive, "if" their parents choose to send them to pre-school, "if" the pre-school program is one, two, or three years in length, "if" the dual-occupancy program does not provide for them, "if" no further private facilities can be found, "if" the New York City Educational Construction Fund does not combine pre-kindergarten ✓ classes with housing then by 1971, we might have a problem.

If all these "ifs" come to pass, we propose that in the educational park at the Flatlands site a splendid, specially designed pre-kindergarten and kindergarten unit be constructed that could be incorporated into Linear City, if it gets approved. (The mothers from both North and South of the Linden Blvd. color line can bring their children to the school and spend the morning shopping at the Linear City Macy's or working at the Linear City industrial park). In any case, this too can be considered one of those diversions through which the Board has protracted these proceedings and disheartened, discouraged and angered the people of Brownsville.

Ten months after the initiation of this appeal, the Board continues to hold fast to its original unacceptable plan.

continued...

Nothing has changed except that the conviction in the Negro community has hardened that this Board of Education and its Superintendent of Schools, Mr. Bernard Donovan, will never break the color line of Linden Blvd; that they have no intent whatever, here as in the Bro nx in Coop City, or in Queens at Andrew Jackson High School, of stemming the alarming growth of school apartheid or of promoting any new ideas for high quality education in a well-integrated educational park that is the hope of this community.

The petitioners request of the Commission of Education that these delays and diversions by the Board be brought to a halt; they have bean given every opportunity by the Commissioner to respond in good faith and they have failed both the petitioners and the Commissioner.

We ask that the Commissioner order:

1. immediate planning of construction of the seven stayed schools in an educational park for East Brooklyn at any one or more of the several sites proposed by petitioners, and that no monies now under the stay order be permitted to be diverted to other purposes, and

2. that the stay order be extended to include intermediate schools I.S. 342 and 343 which have just received approval in the finalized Capital Budget for 1967-1968 (See City Record 4-25-67) and also to stay the other schools designated as "spine"

continued..

schools in Exhibit "A" of the Board's 4-10-67 letter including school "X" to assure the orderly growth of the educational park beyond the original seven schools to include all the children from the 5th grade to the 8th grade in the designated area of East Brooklyn contained in petitioners plan and

3. That the Commissioner take the necessary steps pursuant to Section 306 of the State Education Law to remove from their office the Board of Education and its lay staff members who have contributed to the contempt of the order of the Commissioner of September 30, 1966, by their act of proposing the same disposition for the seven stayed schools that was the substance of this appeal in the first instance.

We look forward to an early hearing.

RESPECTFULLY SUBMITTED,

John E. Silverberg

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Additional material for
5/24/67 Amer Ed Park
meeting. - Am Jewish
Congress
15 E 84th St.
Wed - 2nd floor

[Feb. 21, 1967]

MEMORANDUM
TO THE
NEW YORK CITY BOARD OF EDUCATION
ON THE
EDUCATION PARK

CORDE CORPORATION
Piersall Building
Wilton, Connecticut

A Non-Profit Corporation for
Community Research and Development

February 21, 1967

To: Members of the New York City Board of Education
From: The Corde Corporation
Re: Education Park for East Central Brooklyn

INTRODUCTION

In response to your request we have prepared this interim memorandum on the school construction program for East Central Brooklyn and the role of the education park in providing increased opportunities for educational quality for all the children living in that area of New York City.

As you know, this examination of the school situation in East Central Brooklyn is one part of the broader feasibility study currently underway in Baltimore, Philadelphia, and New York. The results of the full study will be available later this spring; and the purpose of this memorandum is to provide whatever advice we can in a specific school planning situation. In this sense, the memorandum is similar to our recent report in Philadelphia where we commented on a specific proposal for a system of parks in that city.

The question as it has been posed to us in East Central Brooklyn is what we would recommend to the Board concerning the proposal by citizens from and representing Brownsville for an intermediate school education park to serve all of East Central Brooklyn and a counter proposal for education parks offered by the staff of the Board of Education.

Crucial to an evaluation of these or any other park proposals is the educational benefit of parks, and the advantages they may enjoy over smaller, scattered site schools. This forms a most important phase of our tri-city feasibility study, and is still underway. Our studies and consultations already suggest several important opportunities the park form of construction can offer, including the provision for greater decentralization of school administration, the creation of specialized facilities not normally feasible in all scattered site schools, a greater potential for racial and economic integration, and the opportunity for more effective deployment of staff. We have also discerned that if the park is to be an effective new approach to school programming, its organization and form must be kept flexible to meet the specific needs of the area it is to serve. This applies not only to its size and grade organization, but also to its physical relationship to the community.

Our studies on the educational implications of the park are yet to be finished, but will be provided to New York as part of our overall study. However, the information and insights we have gained have guided the comments which now follow.

BACKGROUND

It would be useful at the outset to present a brief statistical profile on the communities involved in the education park proposals for East Central Brooklyn. This information, which was derived from data of the School Planning and Research Division*, is intended to provide only the most general guide. The emphasis on a statistical profile is made only because park proposals invariably involve numerical definitions of some of the problems they purport to solve.

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*Special Ethnic Census 1961-1965

There are five communities of East Central Brooklyn. These include:

Brownsville (1960 population, 123,073):

Of all of East Central Brooklyn's communities, Brownsville has experienced the most dramatic changes in the racial composition of its population. During the last decade, 1950-1960, Brownsville lost 38 per cent of its white population, and had a sharp rise in its Negro and Puerto Rican population with the result that by 1960 57 per cent of its population was white and the remaining 43 per cent were Negro or Puerto Rican. That the trend has continued is indicated by the fact that only ten per cent of the resident births in 1965 were white.

The school situation in Brownsville is this:

Public School Population and Schools

Public Elementary School Population

	Schools	
Grades	K-5	K-6
Number	5	8

Year	Population	% White	% Negro or Puerto Rican
1961	16,428	29.4	70.6
1963	16,024	19.5	80.5
1965	16,408	9.6	90.4

Junior High School Population

	Schools	
Grades	6-8	7-9
Number	2	1

Year	Population	% White	% Negro or Puerto Rican
1961	3,662	30.9	69.1
1963	3,376	22.7	77.3
1965	4,527	20.3	79.7

Canarsie (1960 population, 61,181):

During the period 1950-1960 Canarsie underwent significant population increases. The trend has held largely as a result of the continued construction of middle-income housing. Overall population jumped by 58.5 per cent during the past decade. The area is predominantly white. In 1955 84 per cent of all resident births were white; by 1965 it had climbed to 91 per cent.

The elementary and junior high school enrollments reflect the predominantly white racial composition.

Public Elementary School Population

	Schools
Grades	K-6
Number	8

Year	Population	% White	% Negro or Puerto Rican
1961	8,858	86.5	13.5
1963	9,414	88.0	12.0
1965	10,171	85.5	14.5

Public Junior High School Population

Schools	
Grades	7-9
Number	2

Year	Population	% White	% Negro or Puerto Rican
1961	2,458	89.7	10.3
1963	1,869	81.4	18.6
1965	3,844	84.6	15.4

Flatbush-East Flatbush (1960 population, 238,232):

This community is showing some changes in population composition. From 1950-1960 it has lost approximately six per cent of its population and experienced a slight increase (1.7 per cent) in its Negro and Puerto Rican population. Resident births show a continuing pattern of white losses. In 1955 97.6 per cent of the births were white; in 1965 85 per cent were white.

The educational demographic situation indicates still sharper losses in the white population, but much of this stems from the fact that Flatbush receives non-white students from other communities.

Public Elementary School Population

Schools			
Grades	K-5	K-6	K-8
Number	3	10	2

Year	Population	% White	% Negro or Puerto Rican
1961	15,276	81.6	18.4
1963	15,354	81.0	19.0
1965	14,241	78.1	21.9

Public Junior High School Population

Schools		
Grades	6-8	7-9
Number	1	2

Year	Population	% White	% Negro or Puerto Rican
1961	5,219	93.0	7.0
1963	5,519	80.6	19.4
1965	4,857	69.0	31.0

Midwood-Flatlands (1960 population, 145,913):

This area of East Central Brooklyn is the most stable. It experienced a two per cent gain in population during the 1950-1960 period, and its 1960 population was 99.2 per cent white. From 1955 to 1965 there was a slight drop in white resident births from 98.8 per cent to 97.7 per cent.

Public Elementary School Population

Schools			
Grades	K-5	K-6	K-8
Number	2	5	1

Year	Population	% White	% Negro or Puerto Rican
1961	10,026	98.9	1.1
1963	10,853	97.3	2.7
1965	10,142	91.3	8.7

Public Junior High School Population

Schools		
Grades	6-8	7-9
Number	1	2

Year	Population	% White	% Negro or Puerto Rican
1961	3,315	98.6	1.4
1963	4,339	97.9	2.1
1965	5,703	95.9	4.1

East New York (1960 population, 156,858):

East New York is possibly the least stable of the five communities. The population shifts during the past decade only hinted at the more accelerated changes which have occurred since. The total population dropped by 1.6 per cent in the 1950-1960 period. At the same time the white population dropped from 98.2 per cent to 88.4 per cent of the total. The resident births show a drop from 90.5 per cent white in 1955 to 38.7 per cent white in 1965. This is an area where considerable new housing construction will be taking place.

Public Elementary School Population

Schools		
Grades	K-5	K-6
Number	5	9

Year	Population	% White	% Negro or Puerto Rican
1961	15,314	64.2	35.8
1963	17,101	49.2	50.8
1965	18,525	33.1	66.9

Public Junior High School Population

	Schools	
Grades	6-8	7-9
Number	2	3

Year	Population	% White	% Negro or Puerto Rican
1961	6,109	60.1	39.9
1963	6,499	46.9	53.1
1965	7,324	36.2	63.8

The five communities present considerable diversity, not only in population composition, but in physical characteristics. Their housing ranges from the tightly-knit, and increasingly substandard row houses of Brownsville to the large, single family houses of Midwood and Flatbush. The area includes both wood frame two family homes in Canarsie and parts of East New York, and the high rise, middle income housing already constructed or underway in the southern sectors. Running along a railroad spin which traverses the center of the area are mixed light industrial and wholesale uses, some of them strong, others in a state of decline and a blight to adjacent areas. There is high density land use along such major arterials as Flatbush Avenue as well as open space, particularly along the southern marshes which border Jamaica Bay.

A walk through the area gives a much stronger impression than do statistics of the changes which are taking place. In the highly-developed northern section of the area one sees evidence that physical blight, already pervasive in Brownsville, is beginning to spread. To the south the new construction represents another chapter in the city's frantic effort to augment its supply of standard housing.

But neither the data nor first hand observation show that the future is set for East Central Brooklyn. In our judgment, the shape of the future can still be determined by public policy decisions, the scope of which we will indicate further in this memorandum.

CURRENT SCHOOL CONSTRUCTION PROPOSALS

The intermediate schools form a central issue in the school construction proposals for the area, and the question in this analysis is how and where these schools should be built to achieve desegregation of existing junior highs and the integration of new intermediate school space.

Parents from and representing the Brownsville area propose that all new intermediate school space be provided in an education park. These parents, who from this point on we will designate as "the petitioners" in view of the injunctive proceedings that have taken place, strongly prefer that this park be construction on the Flatlands site which is designated as site "B" on the map at the end of this memorandum.

As a result of the petitioners' appeal of last spring, the State Commissioner of Education enjoined the Board of Education from constructing seven scattered site schools in the area which the petitioners claimed would not provide for desegregation of existing schools but would lead to further segregation; and which would preclude the construction of the education park as they proposed it. These seven schools included four elementary schools for Brownsville, and three intermediate schools -- one each in Canarsie, Midwood-Flatlands, and East New York.

The petitioners proposed that the funds for these scattered site schools be diverted to the construction of an intermediate school park which would eventually house a minimum of at least 15,000 children with no precisely-stated maximum. A large number of these children would be drawn from six existing intermediate schools which are already either predominantly Negro or white.

Under the petitioners' plan five of these schools would be converted into elementary schools to alleviate overcrowding. The sixth would be turned into a high school annex. A seventh intermediate school, already integrated, would also feed its students to the new park and the existing plant would be transformed into additional high school space.

High on the list of advantages of the petitioners' plan is that -- given the enrollment projections they use -- it would preclude the construction of any new school which would clearly be either racially imbalanced or racially segregated. Furthermore, it seeks to desegregate existing schools.

A principal reason that the administrative staff has not responded favorably to the petitioners' plan is that they feel that the racial composition of some of the areas which would serve the park is unstable, and that the park would lead to de facto segregation.

The statistical basis for this assertion, as it was presented during the petitioners' appeal, was the change in school composition in areas adjacent to the Flatland site, including Brownsville, the northern parts of East New York and Canarsie, and that part of Flatbush-East Flatbush immediately adjacent to Brownsville. Within one and one half miles of the Flatlands site, the staff identified 23 of 24 elementary schools which lost white students between 1958 and 1965. The staff also pointed to a loss of white students throughout the East Central Brooklyn area which was significantly greater than the overall city-wide trend.

Using the same data as the administrative staff, the petitioners arrived at substantially different conclusions. While conceding that elementary schools adjacent to the Flatlands site had lost students, the petitioners claimed that no long range projection could be derived from past losses partly because in many of the schools there were few, if any, white students left to lose. They also cited the population stability in such areas as Canarsie and Midwood-Flatlands as well as the high levels of new middle income housing construction as offsetting non-white increases in other areas.

On the issue of the rate of white student losses, the petitioners questioned the validity of comparing one section of Brooklyn against city-wide totals because the latter is weighted with such predominantly white bastions as Queens and Staten Island. They felt that a more realistic comparison would be between East Central Brooklyn and the remainder of the Borough which they indicated showed a relatively stable racial composition for the area to be served by their park proposal.

This statistical deadlock between the administrative staff and the petitioners has resulted in significant differences in the way each perceives the potential for school desegregation and integration. The petitioners see increasing stability as a trend which can be assured by a construction of an education park which would offer quality education as a positive attraction for white students. The staff takes a more pessimistic view. Its latest proposal for school construction seeks to achieve integration in some, but not all, new school space; but the problem of segregation in some existing intermediate schools will remain.

This proposal, which was forwarded to local school boards last September, is considerably broader in scope than the original construction program which was the subject of the petitioners' appeal. It calls for the construction of two education parks: one to serve Canarsie, Brownsville, Flatbush-East Flatbush, and Midwood-Flatlands; the second to serve East New York and adjacent areas in the Borough of Queens.

The first park, which would be located in Flatbush-East Flatbush on a site designated as "A" on the map at the end of this memorandum, is part of a construction package which would also include the construction of three intermediate schools and one senior high as a park of 10,000 students; and three separate intermediate schools, one of which would be constructed in Brownsville and would be a de facto segregated school. Sites for the other two intermediate schools have not been specified, but they would be located in predominantly white areas.

The second park would be located in East New York on either site "C" or "D". It would include a high school and three intermediate schools for a total park population of 9,400. The intermediate school component of the park would draw 3,000 students from East New York and 2,400 from the Woodhaven Richmond Hill, Richmond Hill South, and Ozone Park-Howard Beach sections of Queens, and approximately 2,300 of these would be white students.

THE PROBLEM

In weighing these two plans, that is, the petitioners' proposal for one large middle school park and the subsequent staff proposal for two parks and three scattered site intermediate schools, the Board is faced with a considerable dilemma. Part of it stems from the fact that it now has but two alternatives. But another important part of the problem is that it lacks a firm basis for choosing between them, namely a comprehensive insight into the population changes and probable projections for the total area.

One recommendation we would make at this point is that the Board provide resources to the School Planning and Research Division so that it can engage in more intensive demographic studies. Such studies are required if the Board is to plan effectively for integration. Alternatively, the Board might wish to participate in a city-wide effort of computerized demographic analysis which would be made available to all agencies. In either case, it is important that the Board be equipped with the necessary data to carry out its responsibilities particularly in sensitive areas such as East Central Brooklyn.

We have obviously had neither the time nor the staff to engage in such detailed analyses ourselves. However, by applying the percentage-survival method of enrollment projection currently used by the administrative staff, but without imposing arbitrary ceilings on the data as the staff now does, we would point out that in the Canarsie and Flatbush-East Flatbush areas, there would be a total of 1,681 and 977 intermediate school pupils respectively by 1972 above the staff's current projections for these areas. Of this total of 2,658 children, approximately 2,032 children would be white and 626 would be Negro and Puerto Rican. This increase, as well as the total public school picture in the area, will be influenced, of course, by private and parochial school policies in the years ahead.

OUR RECOMMENDATION

A continuing question in our minds as we studied the petitioners' proposal has been the advisability of providing all new intermediate school space for the entire area on one site. This question was underlined as we uncovered the possibility of additional intermediate school space needs by 1972. As best as we could determine, this would mean that the petitioners' park proposal would have to be expanded into a middle school park of approximately 19,000 children. The fact that much of the student population increases will occur in the southern portion of the area raises still further question of whether there should be greater flexibility in the petitioners' proposal -- namely, that there should be more than one park site.

The counter proposal for two parks by the administrative staff is a partial response to this need for flexibility. However, it suffers from two serious deficiencies: it includes the construction of a de facto segregated intermediate school in Brownsville; and it would not deal effectively with the present segregation in some existing intermediate schools.

We perceive still broader problems with both proposals. Neither is related to the physical needs of East Central Brooklyn, and neither is in a firm position to influence change in the area. Both have been developed in a planning vacuum. Nothing better illustrates this than the fact that neither proposal takes into consideration the cross Brooklyn expressway which, as presently planned, will traverse the entire area along the alignment of the Long Island Railroad cut. This proposed highway would cut through part of the staff's Flatbush site (site "A") and would partially isolate the Flatlands site (site "B").

While the expressway, which will be under construction during the next five years, offers traffic benefits to the entire Borough of Brooklyn, it could, if insensitively planned, cut a brutal swath through East Central Brooklyn. Moreover, at the current planning levels, the huge public investments that will go into the expressway and the new schools for the area have no relationship and are, in fact, in conflict with each other.

Our prior studies in Philadelphia correspond with our current effort in New York in one key respect. We have become firmly convinced that if school construction programs are to achieve the goals of desegregation, enhancing school quality and encouraging a meaningful role for the schools in the life of the community, then school boards must relate their physical development programs to other public and private efforts. It has become abundantly clear that the pursuit of school integration, for instance, will be frustrated if the schools go one way and the agencies concerned with new housing go another. This is the apparent case in East Central Brooklyn where thousands of new units of middle income and, therefore, probably predominantly white housing are proceeding at a frantic pace in the southern sections of the area while the administrative staff grapples with the problem of white school losses in the northern end.

There is little comfort for one who seeks to discern a unity of purpose among public agencies dealing with East Central Brooklyn. The unchecked blight and deteriorated housing of Brownsville, the clash of school sites with a proposed highway alignment, the lack of precise population data and detailed demographic analysis, and the almost casual site selection for new housing are examples of the paucity of comprehensive planning. The area is blessed with many natural attributes, active and concerned citizen interest, and considerable potential to become one of the city's more attractive residential areas. Its greatest problem is the city's inadequate response to its needs.

New York is too big and its problems too complex to identify villains. Our criticism is not levelled at a division or at a department or at a person, but is directed at the traditional public way of approaching problems with each agency pursuing its own separate course. It is this lack of a total strategy and total development which caused many of the problems, including East Central Brooklyn's, which face the city today. It is therefore impossible for us to recommend the continuing practice of isolated agency efforts to deal with problems which are broader than one agency's power to deal with them. For this reason we cannot express enthusiasm for either the petitioners' plan nor the administrative staff's plan. However different or new in approach either plan may be when compared to present or prior school construction efforts, they remain vivid examples of the schools "going it alone."

Our recommendation for total development in which not just schools but housing, commercial facilities, and other public improvements are combined under a single strategy is not a new suggestion, nor is it one that has not already been expressed by many both in and outside of the city government. The big question, is however: where is the money to implement such comprehensive planning?

Huge private investment is called for, but first there must be a public commitment. While there is general agreement that Federal funding levels for the cities will increase substantially in the years ahead, there remains the important problem of how much money will be made available and when. Many important programs are being held back for lack of the necessary financial commitment and initial funding. East Central Brooklyn, however, is already scheduled to receive substantial public investment both in the expressway and the new schools needed in the area. The combination of these investments which could lead to others represents a necessary first step.

The railroad line which is the preferred alignment for the expressway represents a strong physical symbol which is shared by the five communities of East Central Brooklyn. While the communities present widely divergent individual characteristics the railroad presents a common theme among them as it burrows past Brooklyn College and the tree-lined residential streets of Midwood, continues along the sites of relatively-new apartment houses in Flatbush, and then surfaces in the light industrial areas of Canarsie and moves northward through Brownsville and East New York.

Although it was never designed to fulfill such a role, the line unites the entire area, and is presently the key to its future. Much of the land along the line has enormous development potential, including the two sites under consideration for education parks. Other sites and land uses close to the line represent a distinct threat to the area. They include marginal light industry, junk yards, and obsolete plants and inefficient storage facilities. And now there is what many residents regard as the spectre of disruptive highway construction planned above the line.

The combination of the already incompatible land uses along much of the railroad and the new highway could well become a severe blow to the health and vitality of East Central Brooklyn, seriously hampering efforts to achieve residential stability. However, if the highway is meshed with sensitive community planning, it could lead to a total linear development of a new community center which would include housing, commercial facilities, recreation, and schools connecting the entire East Central Brooklyn area.

The first step toward this needed total development would be a recognition by the city that in planning a highway above the railroad line, it is not faced with a problem of how to fit together two forms of transportation, but is dealing with an opportunity to create a major transportation spine which not only would cross the area, but could serve it as well.

The rail line is preferred as the alignment for the highway partly to cut down some of the disruption and displacement that large-scale road building usually incurs. But the alignment also presents some unusual challenges. One is to find a way to use the line without disrupting service. Another is to screen the expressway wherever possible from adjacent residential areas.

Serious consideration is being given to deepening the cut, placing the line on a lower level, and decking the expressway above. What we would propose is that the further depression of the rail line and the decking of the highway be accompanied by the provision of additional lanes or tracks for a local transit service for at least the five communities. Thus, the means for total linear development would be established.

Through the use of air rights, adjacent sites, and spot clearance we envision the construction of this transportation spine being accompanied by large scale residential, commercial, and public development in which the schools would play a major role. School space would be constructed along the spine. Specialized facilities would be provided as part of an overall linear school where it would be possible to provide outstanding centers for such fields as science, the arts, and technology. This system of schools could be anchored at one end by Brooklyn College and a new community college and technical institute at the other. Some high school students could spend part of their school day in advanced work at either college.

In effect children would be in school once they arrived at stops along the transportation line which are closest to their homes. The local transit service would take them to the facility where they would receive instruction. Each special facility along the line would permit a student to spend part of or a full day or perhaps a month at a humanities, science, or social science center or at whatever facility and for whatever length of time required by his individual needs.

The means of conveying the pupils along the school could be a series of special rail cars or one of a number of new vehicles being developed such as a rail bus capable of running along tracks as well as on regular street pavement. At night the school centers would be available for adult use.

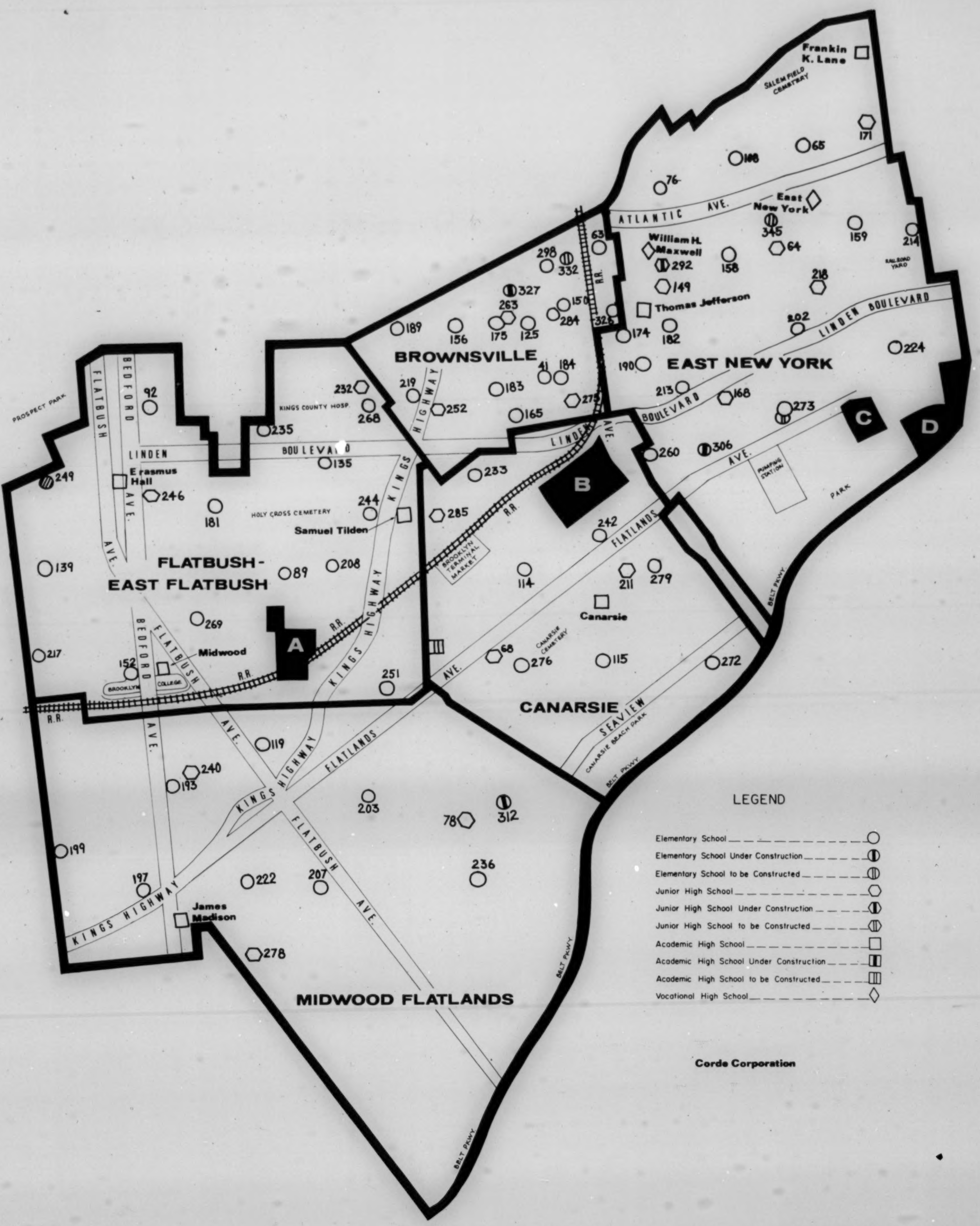
At the end of this memorandum we have included two sketches which suggest the development we envision and recommend for immediate planning. Like these proposals, the sketches are mainly suggestive for we have had neither the time nor did our original mandate include the requirement to develop any alternative to the existing proposals of the petitioners and the administrative staff. We feel that this proposed development would meet not only the stated objectives of these original proposals, but would achieve the equally crucial objective of combining school programs with the total community development which is required.

This proposal would not present a significant delay in school construction. Rather, it would assure a more vital role for the schools in a broad development effort.

It could be that, in concert with other public agencies, and with community involvement in the planning, this comprehensive effort to provide housing, community service centers, employment opportunities, shopping clusters and school and cultural centers would result in a revitalized city within a city, one which would be stable, environmentally pleasing, and capable of offering the urban dweller conditions for the attainment of his personal aspirations. The fact is that we know of no other way to deal with the total needs of East Central Brooklyn other than the large-scale effort implied in this planning proposal.

THE CORDE CORPORATION

Cyril G. Sargent, President
John B. Ward, Secretary-Treasurer
Allan R. Talbot, Study Director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RAILROAD YARD
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Thomas Jefferson
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LINDEN BOULEVARD
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PARK
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Erasmus Hall
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HOLY CROSS CEMETERY
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Samuel Tilden
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FLATLANDS
FLATBUSH AVE.
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BROOKLYN TERMINAL MARKET
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KINGS HIGHWAY
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Midwood
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FLATBUSH AVE.
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MIDWOOD FLATLANDS
BELT PKWY
LEGEND
Elementary School ○
Elementary School Under Construction
Elementary School to be Constructed
Junior High School
Junior High School Under Construction
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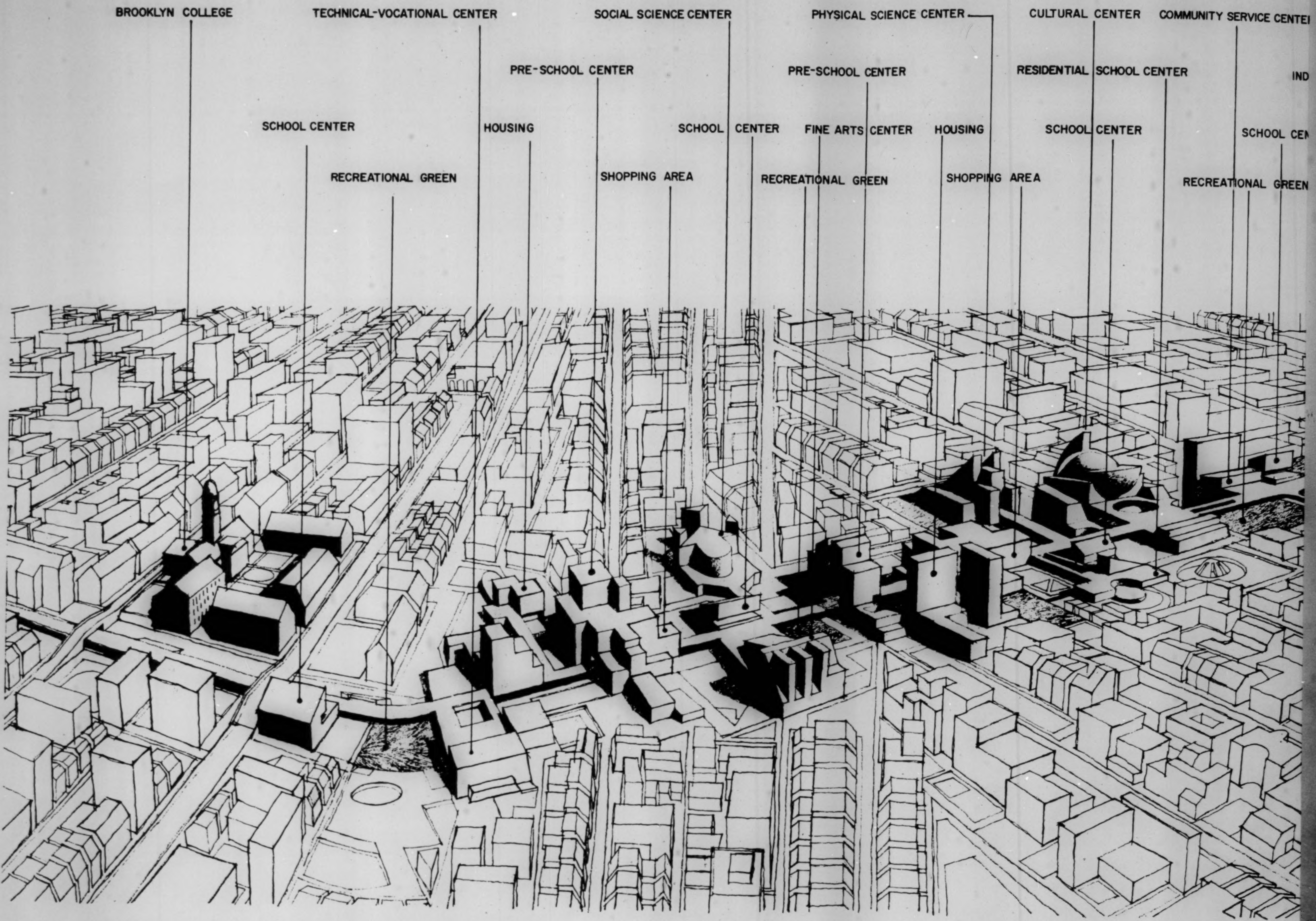
Academic High School ☐
Academic High School Under Construction
Academic High School to be Constructed
Vocational High School ◇

Corde Corporation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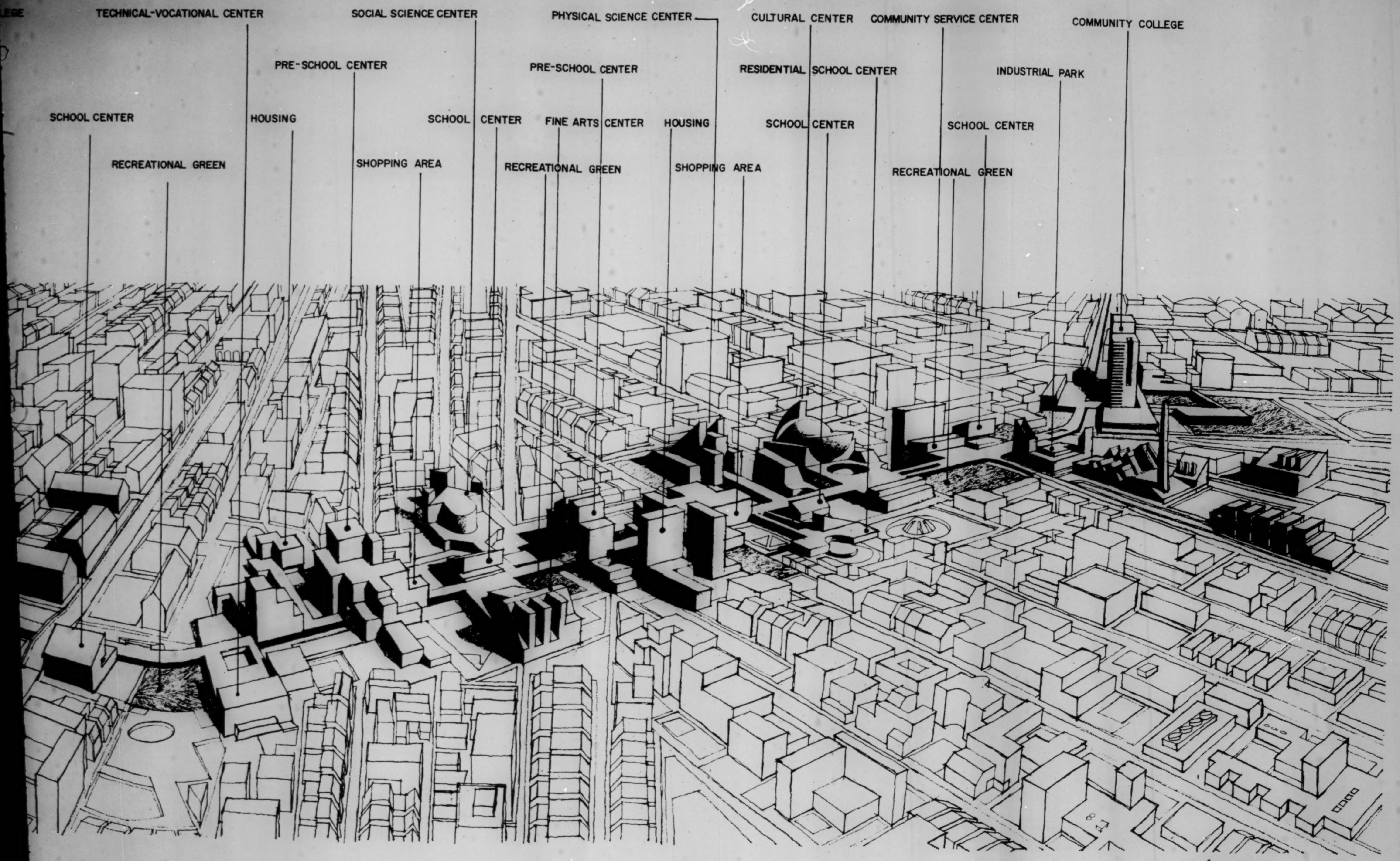
CORDE CORPORATION · WILTON, CONN.

COMMUNITY - EDUCATIONAL SPINE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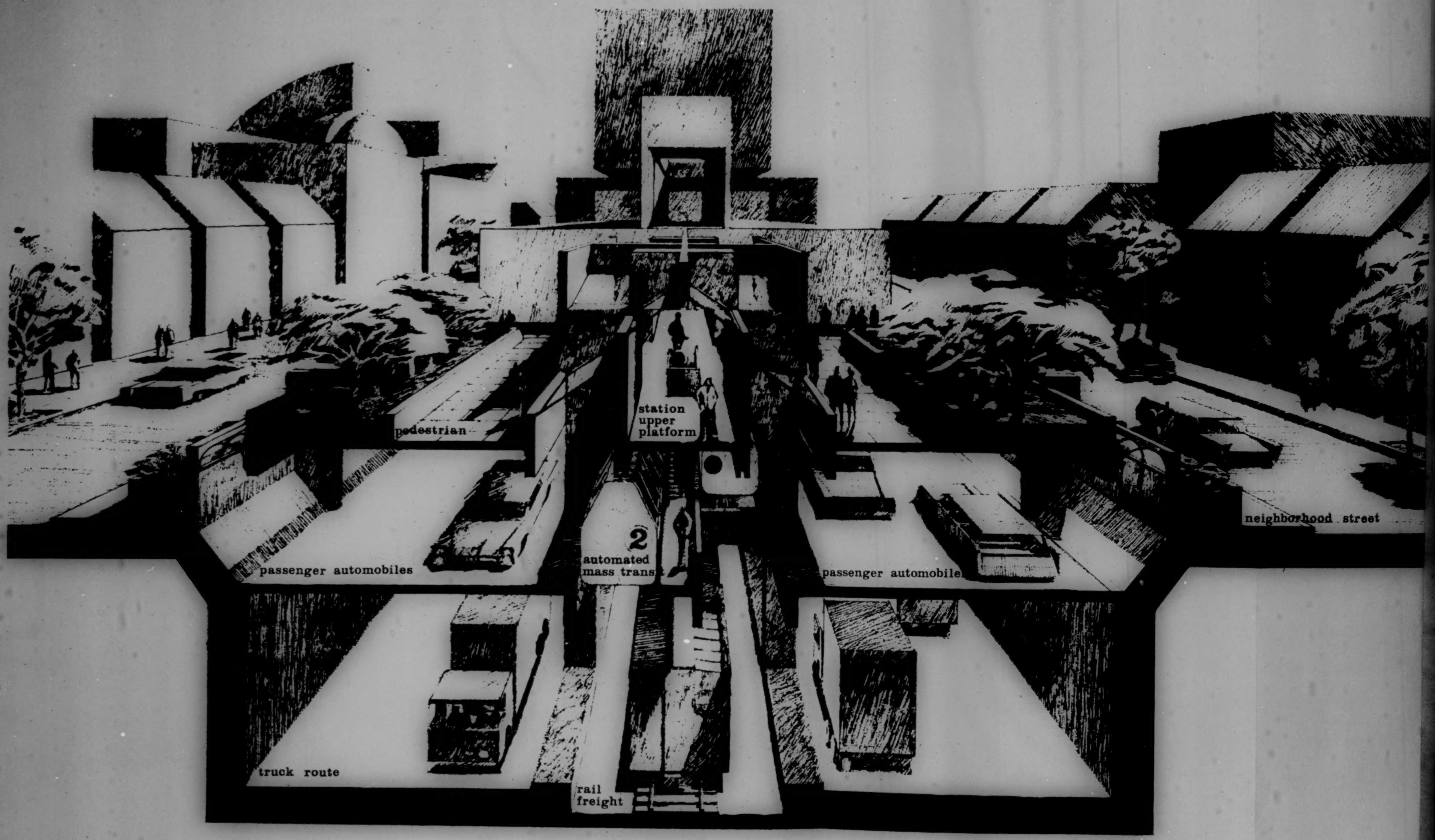
ORPORATION · WILTON, CONN.

UNITY - EDUCATIONAL SPINE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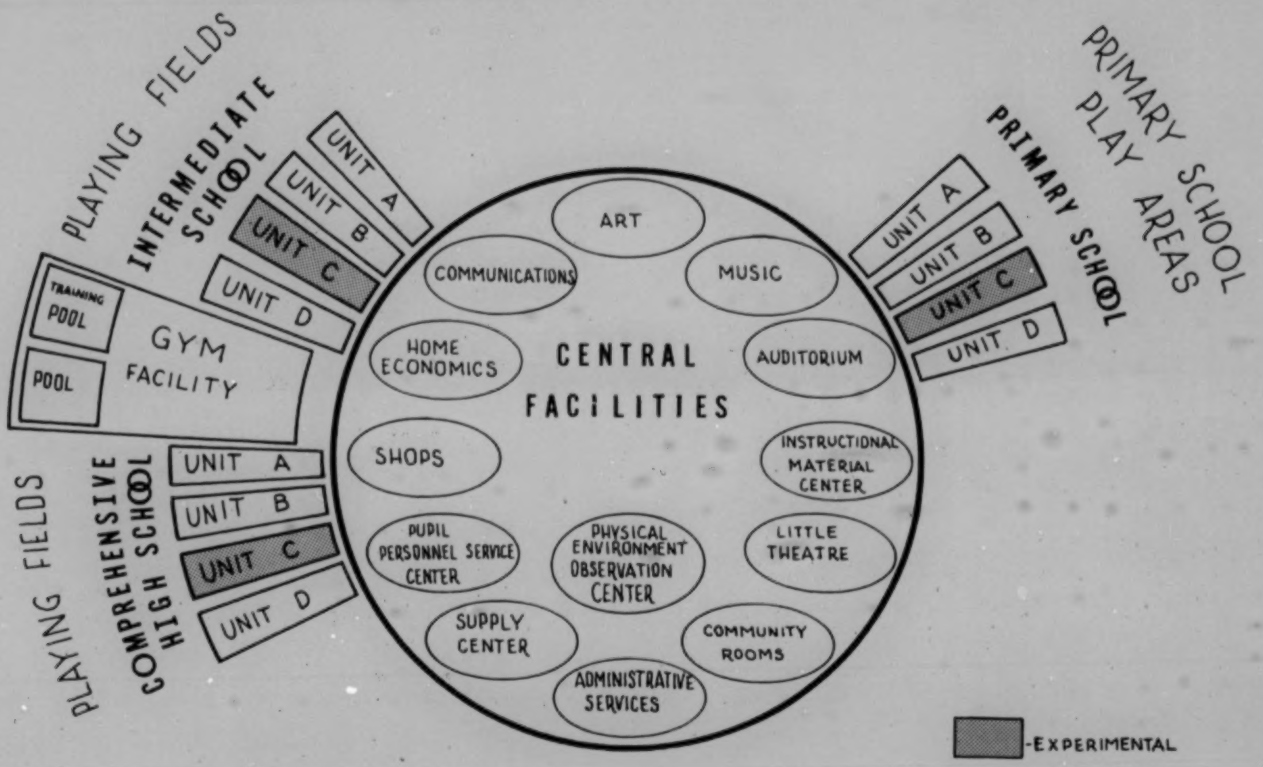
PLAYING FIELDS
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UNIT A
UNIT B
UNIT C
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UNIT A
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COMMUNITY ROOMS
ADMINISTRATIVE SERVICES
PRIMARY SCHOOL PLAY AREAS
PRIMARY SCHOOL
UNIT A
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-EXPERIMENTAL

The Education Park:

What Should It Be?

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The printing of this report was arranged through the Office of Education Information Services and Public Relations: Mark Price, editorial and design consultant. The charts were drawn by Victor Singer of the Bureau of Audio-Visual Instruction and by Donald Pitkoff of the Bureau of Industrial Arts. The map on page 24 which locates the Education Park was contributed by the Office of the Borough President of The Bronx.

110 Livingston Street, Brooklyn, New York 11201

The Education Park: What Should It Be?

Educational Specifications
For the Northeast Bronx
Education Park

☆

August, 1966

CONTENTS . . . *Continued*

PAGE

Central Facilities—*continued*
  16. Student Government Rooms 14
  17. Education Park Office Facilities 14
  18. Community Rooms 14
Physical Education Facilities 14
  1. Aquatic Skills Facilities 14
  2. Gymnasium Facilities 15
  3. Outdoor Athletic Spaces 15
  4. Field House 16
  5. Joint Facilities 16
  6. Community Relations 16
Communications System 16
Library Facilities 17
Science-Laboratory Facilities 17
Pupil Personnel Service Center 19
Central Supply Facility 20
Food Service 21
Outdoor Facilities 21

Highlights of the Education Park Plan 23

Diagrams 24
  Location of the Education Park
  Administrative Relationships

Individuals Consulted 25

Appendices (Selected Memoranda from Consultants) 26
  I. Park Plan of Organization 27
  II. Planning Classrooms and Auxiliary Spaces 31
  III. The Community School and the Park 32
  IV. The Arts — Fine and Applied 33
  V. Instructional Materials Center 34
  VI. Health Education 35

troduction

This document represents the first outcome of a Title III project under the Elementary and Secondary Education Act. A grant was given specifically to assist planning for an educational park to be constructed on part of the site once occupied by Freedomland Recreational Park. The rest of this site is being developed as Co-op City, a major apartment development for middle income families.

In preparing educational specifications for the Northeast Bronx Education Park, the following major criteria were used to select and develop features:

1. Provision for integration of children of diverse backgrounds.
2. Development of sound community-school inter-relationships.
3. Implementation of the Board of Education's policy statements on grade level reorganization.
4. Educational innovation in organization and curriculum.
5. Improved articulation among the three school levels.
6. Economy through joint use of facilities.

These educational specifications have been drawn up in the light of existing New York City programs and organization, and as a result of study and consultation with outside sources. Published material on educational parks has been analyzed and proposals in other communities have been studied. The superintendents in charge of elementary, junior high and high school offices have been consulted, as have the directors of early childhood education and the various subject areas. Expert consultants have provided information and recommendations regarding every phase of the proposed specifications.

Appended to this report is a list of those consulted during its preparation. In addition, several of the memoranda on which parts of the report are based are reproduced in full in the form in which they were submitted by the consultants.

JOSEPH F. X. MCCARTHY
Project Coordinator

PART I:

General Considerations

Integration

The size of the expected student population of the Northeast Bronx Education Park is large enough to provide an ethnically mixed student body.

Total Spaces in Education Park	
High School	4,000
Intermediate School	3,600
Primary School	2,800
Total	10,400

In addition, one primary school is to be constructed on a separated but nearby location in the Co-op City area. It will be connected with the Communications Center of the Education Park.

It is anticipated that approximately two-thirds of the student population will be drawn from the families living in the Co-op City apartment project and that approximately one-third will be children living elsewhere. The Co-op City population is anticipated to be predominantly white; estimates range from 75% to 90% white for this population group. Adjoining the Education Park site is a growing neighborhood which is very heavily occupied by Negro families. It is expected that many of their children will be included in the student population of the Education Park. In addition, there is a low-rent housing project proposed for the immediate vicinity, the residents of which will probably be drawn largely from minority ethnic groups. The exact geographic areas or neighborhoods which will be served by the Education Park have not yet been defined. However, in keeping with the integration objective of the Board of Education, it is estimated that one-third of the pupil capacity of the Park will be allotted to minority group neighborhoods outside the limits of Co-op City.

The mere presence of members of two ethnic groups in the same Education Park is not the answer to the integration objective, however. For effective integration of children from diverse backgrounds, it is planned that children will remain with substantially the same classmates for all of primary school or intermediate school or high school. This will be accomplished by organizing the three school levels into "sub-schools" or "units" to which children will be assigned on a completely heterogeneous basis. Children in the primary and intermediate school will be assigned to "clusters" of from four to seven classes and it is expected that they will remain with their classmates in these clusters for the majority of their classroom experiences. They will attend gymnasium and take their lunch with pupils in their cluster as high school children will with pupils in their school units. Thus, over the four-year period at each school level, children of diverse backgrounds will have the occasion to work and live together in a school situation.

The population size of the primary school, intermediate school and high school groups provides for the addition of a certain number of children from outside the Education Park at the beginning of intermediate school, and at the beginning of high school. Therefore, a reorganization of "clusters" and of "units" is necessary at what would correspond to grade 5 and grade 9. It is recommended that when this reorganization occurs, there be a deliberate rearrangement of children moving from the primary units to the intermediate and from the intermediate to the high school. In this way, the children will be afforded an opportunity to meet with a larger number of their age peers at each school level. At the same time, they will be members of school "units" of increasing size: 700 at the primary level, 900 at the intermediate level and 1,000 at the comprehensive high school level. This regrouping process will not only insure that each child will be a member of three different socially and racially mixed groups as he progresses through the Education Park, but it will insure that children added to the Education Park population at the beginning of intermediate school or high school will be brought into a new social pattern rather than into one already established and set in its inter-relationships.

Student activities will be provided on a unit basis as well as on a school level basis. As a result, there will be an opportunity for children to meet, in certain circumstances, with others drawn from a very much wider population base. Student government, sports and cultural activities will make possible contacts among youngsters of appropriate age drawn from the entire Education Park.

The integration of students during the school day is only part of the total program planned to foster the integration of those served by the Education Park. Evening school and summer school activities will be provided on an integrated basis, and an extensive program of and for community groups, parent groups, youth action groups and the like will be provided not only for those whose children attend school in the Park, but for those in the broader community served by this Education Park.

The Education Park And Its Community

1. The Community's Contribution

It is expected that community influence on the Education Park program will be exercised mainly through an advisory panel consisting of community leaders from each of the neighborhoods served and representatives of the Education Park parents' associations. These associations will be organized on a unit basis, just as the children will be organized; and a federation of the various unit associations will form a Parent Association of the Education Park as a whole. It will be the function of this advisory panel to meet with the head of the Education Park and with the school principals, and to make known to the responsible school officials the interests and recommendations of community groups. Not only will trade advice for the vocational courses be offered through a vocational council, but a broad occupational advisory service will be made available through the participation of local labor and management in this council.

Some facilities within the Education Park are planned exclusively for use by community groups. Thus, it will be possible for social and other groups to use meeting rooms during the school day, and for continuing programs to be provided in these facilities for golden-age organizations and other community groups.

2. The Park's Contribution

The Education Park is designed to provide special facilities and services for community groups. By community groups we mean not only adults or those who have completed school, but school-age children regardless of their school affiliation who can reach the Education Park to utilize its facilities after the normal day school hours are completed. The principal means by which community personnel will be served at the Education Park is through the creation of an extensive youth and adult center. This center will provide a combination of recreational, avocational and quasi-academic activities.

Formal academic offerings will be provided through the following kinds of school organizations:

a. After-school study centers.
b. Evening high school.
c. Community education centers.
d. Summer school programs at the primary, intermediate and high school levels.

The facilities of the pupil personnel center will be available for counseling and consultation for those who are not registered students in the Education Park. For instance, adults interested in educational or vocational retraining may be counseled here, or children may be referred to this center from other schools in the vicinity of the Education Park.

Parent education will be an important contribution of the Education Park to its community. Parent education rooms are set aside in each of the primary school units where topics related to child care and child development will most naturally be treated for parent groups. However, the presence at the same general location of diversified facilities for the teaching of home economics, the demonstration of skills in home nursing, child care, home decoration, cooking, and clothing design and construction will make this parent education facility far more comprehensive than would be possible in separate facilities for each school level.

It is expected that the Education Park will be a cultural center for its community. The art studios and museum are obvious contributions in this direction, as are the music education facilities of the Park. However, the principal facilities for cultural programs in the Education Park will be the auditorium, little theatre and communications center. The auditorium will provide acoustically excellent facilities for music programs of all kinds. The little theatre will provide a setting for stage presentations and for more intimate audience situations with instrumentalists and vocalists. Moreover, the little theatre will provide a setting for community dramatic groups. The communications center will provide not only access to taped lessons and instructional material, but access to its studio facility for community groups interested in developing their own programs of a dramatic or instructional nature. The possibility of linking home TV sets to the Education Park's circuits will be explored.

The various combination rooms provided in each school unit for eating and other purposes will make available to community groups facilities for meetings with snack service or even with full dinner service for groups ranging in size from 75 to 600.

The contribution of the Education Park to a constructive recreational and leisure time program for youth during summer periods and other periods during which large numbers are free of school-related chores should be decisive. The training pool should make it certain that no youth within reach of this facility will be without basic aquatic skills. The competitive pool, gymnasium, field house and outdoor athletic fields should insure a great variety of constructive leisure time activity, and the air-conditioned instructional facilities will be a powerful magnet to attract youth from the streets into academic or avocational courses during the summer months. Outdoor facilities for court games, skating or dancing will be illuminated in evening hours for maximum use by the community.

Organization and Administration

The total pupil capacity planned for the Northeast Bronx Education Park is 10,400 pupils. This is a vast number and one with which individual pupils cannot be expected to relate directly. In fact, it is highly probable that serious problems would be involved if there were an attempt to have pupils consider themselves as "one out of 10,400."

To counter this possibility and to provide more manageable numbers of pupils at each of the three levels, it has been decided to organize units at each school level. Pupils within each unit will remain in it for the duration of their stay at the school level (primary, intermediate or high school) and will take the majority of their school program, including their physical activities and lunch, with other students in the same unit. Each unit will be supervised by a unit head who will hold a supervisory license and will function in many respects as the supervisor of a separate school of small size.

The unit itself has a fairly large number of pupils, but it is expected that the guidance program will be so organized that children will remain with the same counselor for the duration of their assignment to any school level. Counselors, therefore, will be assigned to school units, and there will be recognizable divisions of children within each school unit which will number no more than 350 for guidance purposes. At the high school level it is expected that the same homeroom teachers will carry heterogeneous homeroom sections through a complete four-year cycle; these homeroom teachers, plus the guidance counselors, will make it possible for the high school students to recognize a unity of assignment, and to feel a secure "home base" within the large school park population.

The four units at each school level will comprise the field of supervision for a single principal at each of the school levels. The principal's assignment will be basically in the fields of community relations, curriculum coordination, guidance and improvement of teaching. It is believed that with the unit as the basic element of his responsibility, and with many administrative chores removed from his office, the principal's span of control over four units will not be excessive.

The Education Park will be operated on a non-graded basis to the maximum extent possible. This presupposes that accuracy and speed in record keeping will be made possible by computer-based equipment. Individual programs will be prepared and altered for children in the Education Park, and the record-keeping and program-construction will be prepared by an administrative service center which will be capable of responding to the demands of the three principals, the heads of school units and guidance personnel. It is expected that in some cases children will take parts of their programs outside their home unit and even outside their school level through the use of central facilities of the Park, or through inter-school talent grouping.

The administrative service center will serve to coordinate the use of common facilities; to provide maximum support of the operating units in terms of business management, communication and computer services; and to insure effective articulation of instruction throughout the grades. The administrator of the Park will have major responsibility for community relations, curriculum articulation, integration and full use of the physical facilities of the Education Park.

There will be a curriculum coordinating unit operating on a park-wide basis. The Park administrator, a curriculum coordinator for the park, subject area supervisors or coordinators, and the heads of the three schools will make up this curriculum committee. This committee will be the principal instrument for achieving articulation among the three school levels.

It is expected that a supervisor of guidance will be assigned to the Education Park to oversee and coordinate the activities of the licensed counselors. This supervisor will serve as the guidance representative on the Park curriculum committee.

A business management office will include a manager to direct such business affairs as teacher personnel records and payroll, supply and distribution of materials, maintenance, transportation and food service.

PART II:

Physical Facilities

Primary School Instructional Spaces

There will be four units established for the primary school, each of them to service approximately 700 children. Included in this number are some in the special education category, for whom three classroom spaces will be allotted in each unit. It is intended that these units will be organized on a non-graded basis into three clusters of classrooms, each of which will cover a two-year age span.

It is desired that each two-year age span be housed in a cluster of adjoining rooms or a classroom complex. A team teaching center will be provided for each such cluster of classrooms. Occupying a central location in relation to the rooms in each cluster will be an additional instructional space, or "cluster instructional center." This should be so designed that special teaching equipment can be stored and used with groups of children drawn from the rooms of the cluster. Such special equipment might include materials in the fine arts, home living or science areas. It should be possible to open two or three classroom spaces into this additional area to provide for those activities that can be best carried on in large groups. This cluster instructional center should be so located as to be under visual control of at least three of the classroom units.

Means should be provided to isolate noise producing activities which will be quite common in the classrooms and central space. In addition, it should be possible to compartmentalize part of this central space or parts of each class space to make small group instruction possible in each cluster of classrooms.

A parent education room will be located close to the early childhood rooms of each unit. This facility should not be set up as a classroom space but rather with more casual furnishings. It will be used for conference purposes with individual parents or with groups of parents, and it should be usable also for conferences involving staff members of the unit professional staff.

A "commons" or interior play and eating area will be provided for each unit, with kitchen facilities shared between adjoining units. This area should include a piano and access to the school's audio-visual resources. A small first aid room will be located near this commons area.

Office suites for each unit will include a secretarial-reception room, space for the assistant principal in charge, and for two guidance counselors. These offices should be separated from each other and should have access to a record room or outlet for the school park computerized records.

A faculty resource work room will be provided in each unit. This room will provide curriculum materials, teachers' reference materials, film strips and records, art and science materials for use in the unit. It will *not* be a faculty library or depository for long-term storage of materials. It will provide a setting for the teachers to prepare instructional materials and office space for teachers in special curriculum areas who may be assigned to the unit (industrial arts, music, science, etc.).

One of the four units will be an *experimental unit*. This unit should include an additional resource work room. The facilities for each complex in this unit should be completely flexible so that the entire area might be utilized without walls or with any combination of large, medium or small compartments. It should be possible

Summary of Spaces Requested per Unit:

Pre-kindergarten and/or kindergarten	7 classrooms
Grades 1-2 (one cluster of 4, one of 3 with common cluster instructional center)	7 classrooms
Grades 3-4	7 classrooms
Special education	3 classrooms
Team teaching centers	3 rooms
Cluster instructional center	2 rooms
Playroom and eating areas ("commons")	1
Parent education and conference room	1
*Faculty resource and work room	1
Assistant principal's office	1
Guidance office (two cubicles)	1
Secretarial office and waiting room	1

*One additional room for the experimental unit 1 to change these facilities in very short periods of time. It is expected that this unit will provide a location for experiments and pilot projects in curriculum, school organization, and internal architecture. An observation room will be provided for teacher training purposes in this unit.

Non-Unit Primary Facilities

The primary school principal's office and a secretarial and general office will be required. Located close to this should be space for the school aides, and for curriculum conferences between members of the primary school faculty and other curriculum workers.

A primary school library and reading room should be so located as to be accessible to each pair of units.

An early childhood playground facility is required large enough to handle up to 240 children; two or four proportionately smaller facilities would be preferred.

An outdoor playground capable of handling up to 240 children in the six- to ten-year age groups is also necessary. Again it would be preferred if two or four smaller areas of appropriate capacity could be provided.

A room for corrective speech and corrective reading instruction should also be provided in the central area of the primary school to service children from all of the primary units.

Two art rooms and two industrial arts materials centers will be provided. Each of these will serve one pair of units in the primary school.

Intermediate School Instructional Spaces

There will be four units established for the intermediate school, each of them to service approximately 900 children. Included within this number will be approximately 80 special education children for whom four classroom spaces will be allotted in each unit.

The intermediate school units will be subdivided on a non-graded basis; however, the age factor will be taken into account so that children of the oldest age group will be organized in clusters of larger numbers.

Groups of classrooms are required close enough to each other to share a cluster instructional center in which certain kinds of special instruction will be provided and in which large group activities can be conducted involving more than one class section at a time. The basic cluster will consist of four classroom spaces and one cluster instructional center. These clusters are intended for the younger intermediate school children. For the oldest age group and/or its intellectual peers, clusters of five classrooms and one instructional center will be provided.

The cluster instructional center will be utilized for several different kinds of activity: large-group instruction carried on for groups from two or more classrooms in a team-like teaching situation; space for several smaller groups to conduct instructional activity as required by their progress in various class subjects (thus, it will be possible to have seven or eight reading groups in each cluster, each learning in an area separated from the others); and for individual or small groups to conduct independent study. In addition, it is expected that some science and other subject matter will be taught primarily in the lower-level cluster instructional center. Equipment in the cluster instructional centers will include a science demonstration table and related area; arts and crafts work-tables; and several typing stations arranged so that children can carry on typing practice after they have completed their introduction to the typewriter in grade 5. Maintaining and developing typing skills, and using the machines in these stations for typing reports and similar projects, will thus be part of the work conducted in the cluster instructional center.

In each of the basic clusters part of the instructional center will be set up as a science demonstration area and one of the classrooms in each of the other clusters will be a science demonstration room. Each five room cluster will have, in addition, a science laboratory-demonstration room. A project preparation room should be so located as to serve both these laboratories and, in addition, be accessible to students so that they can borrow and return science materials for their use at home.

Two seminar rooms will be attached to each cluster of classroom space. These are for small group or individual study, committee work or other supervised school related activities. In each cluster there will also be one team teaching center.

Summary of Spaces Requested per Unit:

Four basic classroom clusters:	
4 classrooms	16 classrooms
2 seminar rooms	8 seminar rooms
1 cluster instructional area	4 cluster instructional areas
Two advanced classroom clusters	
5 classrooms (including science-demonstration room)	10 classrooms
2 seminar rooms	4 seminar rooms
1 cluster instructional area	2 cluster instructional areas
1 science laboratory	2 science laboratories
Special education classrooms	4
Typing classroom	1
Art classroom	1
Industrial arts materials center	1
Home economics room	1
Instruction and eating area	1
Instructional resource center	1
Offices:	
Assistant principal	1
Subject supervisors	3
Guidance counselors	3
Secretary	1
Waiting room	1
Conference room	1
Seminar room	1

A resource center will be located in each intermediate school unit. This center will consist of a library type facility including two areas which can be isolated for library instructional purposes and which can be utilized as reading rooms for the children assigned to the intermediate school unit. The resource center will also include facilities for listening to language tapes, music or voice recordings; it will require access to and space for study of audio-visual materials of all kinds. The resource center should include carrel spaces and other open study areas for up to 90 students and individual carrel-office for faculty members assigned to the unit.

The children in each unit will take their meals in an eating area which will be designed primarily as large group classroom spaces. There should be four such spaces, each to accommodate up to 75 children. They should be separated from each other by sound reducing walls and should be sound treated so as to permit their use simultaneously for class purposes such as singing, speech training and other listening activities. These areas, when combined, will make it possible for up to 300 children to be fed at one time. There should be ready access to a unit serving kitchen which may also serve the eating area in a second intermediate school unit. It would be desirable if a serving area had two serving stations so that the space could be divided with a maximum of 150 children eating in one area.

Offices for the units would include a secretarial office with access to pupil records or to a computer outlet connected to the Education Park's administrative service center. The assistant principal in charge of the unit and subject supervisors (three) should have offices at or near this secretarial service. A guidance office with cubicles for three counselors should also be located in this area.

A waiting room and a conference room large enough to hold 15 to 20 people should be available to the assistant principal and supervisors. A seminar sized room should be accessible to the guidance office for use in group guidance services.

One of the four units will be an *experimental unit.* Its function and design will be similar to that of the primary school experimental unit.

Non-Unit Intermediate School Facilities:

A principal's office and a secretarial and general office will be required for the intermediate school. Office space will be required also for four subject supervisors and a conference room for small groups of supervisors or key personnel.

A room for non-professional personnel assigned to the intermediate school should be provided close to the principal's office. A room for parent association activity is also required.

Comprehensive High School Instructional Spaces

Instructional spaces for the comprehensive high school will be divided into two different categories. The common subject matter and many of the advanced courses will be offered in each of the four units into which the comprehensive high school will be divided. On the other hand, special facilities will be available centrally in the comprehensive high school to provide for advanced or remedial work in various subjects as well as facilities for special education such as vocational training.

The comprehensive high school units will serve approximately 1,000 students each. Home room organizations will be established on a heterogeneous basis and children will remain with a homeroom for their entire stay in high school. Children from each unit will be assigned to health education and lunch periods in common. To the extent that the program is feasible, children will take their subject classes within the unit, leaving it only for special classes for which equipment must be located centrally, or for which registration does not warrant duplication in each unit. It is anticipated that children will spend most of their school day within the unit of 1,000. However, there will be more movement to special classes on the part of older students as they approach graduation.

The classroom spaces will be clustered according to groups of related subject areas, for example: classrooms for English, foreign languages and social studies; classrooms for music and art; classrooms for mathematics and science; classrooms for typing and general commercial subjects. It is recommended that science classrooms and laboratory suites be so arranged that they will be readily accessible to laboratory assistants, and to preparation rooms designed to serve pairs of units. A similar relation should exist between the resource center-libraries of each pair of units.

One area of each unit will consist of four large group facilities. It should be possible to combine the four for eating purposes. When fully opened, it should be possible for this area to feed 350 pupils. It would be desirable if separate serving stations made it possible to separate the lunch groups into two separate areas each of which would handle 175 students. A serving kitchen should be so located as to service adjoining unit lunch areas.

A resource center will be located in each comprehensive high school unit. This center will consist of a library-type facility including two

Summary of Spaces Requested per Unit:

Classrooms: 17, plus 1 supplementary resource room with one group of 7 (English-social studies)
Science demonstration classrooms: 3
Science laboratory: 1
Typing room: 1
Large-group area usable as lunchroom for 350 pupils, divisible into 4 large-group rooms for recitation purposes, and into 8 section rooms—available for program during periods 1, 2, 7, 8.
Specialization for each unit provided as follows:
- In Unit A. Chemistry classroom laboratory plus one demonstration-classroom
- In Unit B. Physics classroom laboratory plus one demonstration-classroom
- In Unit C. Stenography and typewriting room
- In Unit D. Business machines room and merchandising classroom

Resource center-library
Department offices: Three per unit, plus adjoining study carrels to seat up to 25 pupils under visible control of office
Offices:

Unit head	1
Guidance counsellors	3
Secretary-general office	1
Reception and waiting room	1
Conference-seminar room	1

areas which can be isolated for library instructional purposes and which can be utilized as reading rooms for the children assigned to the unit. The resource center will also include facilities for listening to language tapes, music or voice recordings; it will require access to, and space for, study of audio-visual materials of all kinds. The resource center should include carrel spaces and other open study areas for up to 190 students, and individual carrel-offices for faculty members assigned to the unit. Because the emphasis in the high school will move in the direction of more extensive individual study and because it is planned not to have study hall assignments, additional study carrels should be provided in groups up to 25 in number located in any area of the school where such provisions can be made. Adjacent to each department office there should be a grouping of study carrels under visible control from the department office so that students can pursue their studies on either a remedial or advanced level. In addition, two seminar rooms should be located in the vicinity of each department office. It is planned that three department office facilities be placed in each unit of the high school.

An office for the unit will include a reception room, general office facility with access to pupil records in the administrative service center, and space for the unit head. A guidance office with cubicles for three counselors should be located in this area. A conference room large enough to hold 15-20 people should be available for the guidance office and for the unit head.

One of the four units will be an *experimental unit*. The facilities for each group of classrooms in the unit should be completely flexible; changes in wall arrangements should be possible over a very short period of time so that any combination of large, medium or small compartments can be organized. It is expected that this unit will provide a location for experiments and pilot projects in curriculum, school organization and internal architecture. An observation room will be provided for teacher training purposes in this unit.

Non-Unit Comprehensive High School Facilities

A principal's office, a secretarial and general office will be required for the comprehensive high school.

Central Facilities

Certain facilities of the Education Park will not be assigned exclusively to any one school level, but will be available for the use of qualified students and their instructors on a basis of need and availability. In some instances it will be possible for children of different school levels to share the use of these facilities on a basis of talent or interest. In other instances these facilities will be used jointly by students of the Education Park and by people drawn from the community and, on occasion, by out-of-school youth. The following facilities are planned as central facilities of the Education Park:

1. Instructional Materials Center

This central facility will provide a reference center for students and a resource center for faculty members. This center will include specialized reference materials such as are most frequently used by advanced students, together with carrels and small group seminar rooms in which such students may work on their research projects. Microfilm readers and listening apparatus will be provided for the use of students in these reference centers.

The resource center will provide space for a professional library which will be accessible only to the staff of the Education Park. The materials stocked in this professional library will make it possible for teachers to consult material from a number of different curriculum areas or school levels. There will be space in this professional library for committee meetings and for groups of teachers working on curriculum problems.

Space will be provided for duplicating equipment capable of producing bulletins and booklets for use in the Education Park, including information bulletins on recent accessions by the library sections or by the communications center.

A central catalog will be placed in this center as a guide to all instructional materials housed in the Education Park. Thus, students or faculty members will be directed to the locations of books, records, film strips, etc.

The communication center of the Education Park should be close to the resource center so that its library of film strips, tapes and films will be available to those who utilize this center.

The instructional resource center should provide office space for the following personnel:

a. The curriculum coordinator of the Education Park.

b. The manager of the instructional resource center.

c. The head librarian of the Education Park.

d. The curriculum experts assigned to the Education Park for articulating offerings on a K-12 basis in the following areas: reading, English language arts, mathematics, science, foreign languages, fine and applied arts, and commercial education.

2. Auditorium

The auditorium for the Education Park will provide for seating 1,200 people. It should be planned primarily for music or music-type programs, with stage facilities to provide for a second general type of program. The auditorium will be used for assembly periods by all intermediate and high school units, for performances by talent groups, and for large scale dramatic productions both in the day school and in the community-related evening program.

3. Little Theatre

A little theatre to seat approximately 400 people will be designed primarily for stage performances with the possibility of small music programs being presented as an alternate or second type of activity. This facility is planned for the use of all schools in a listening or audience situation, for the presentation of pupil-prepared plays, for other programs, and as a facility for presenting a dramatic work produced in community and evening sessions. It is expected that this little theatre will be utilized largely for activities of the speech and English departments. It would be well if speech laboratory and speech correction facilities were housed in or near it. Dressing rooms and prop rooms should be provided with the little theatre.

4. Band Shell

A band shell will be provided, from which school and community center music programs can be presented. This should be located facing a hardtop play area such as the courts, which may be flooded for ice skating. The area of the band shell will be illuminated so that evening programs can be conducted.

5. Music Rehearsal Rooms

The central facilities will make it possible to provide separate rehearsal areas and practice rooms for four different kinds of music activity: vocal music, brass, strings and woodwind. Instructional space and small rehearsal rooms for these instrumental purposes will be available to groups from the intermediate school and from the high school on a regular basis. Some of these groups will draw children from both school levels at the same time.

6. Fine Arts Rooms

A suite of fine arts classrooms for children with art talent and for instruction in advanced art electives will be a central facility available normally to children of the intermediate and high school, and even to unusually talented primary school children. These facilities will also be available for after-school and evening programs. Studio rooms for painting and for sculpture will be provided.

7. Industrial Arts Suite

Industrial arts shops for intermediate school and high school students will be located in the same general area. These shops will include six single unit shops for the intermediate school and ten single unit shops for the comprehensive high school (these will include drafting, plastics, transportation, etc.). The industrial arts suites will be so designed that certain facilities can be jointly used; for instance, a dark room will serve the graphics facility of the high school and intermediate school; a common supply center will serve both shop groups. The shop complex should be accessible separately from the intermediate school and high school. The shops should be close enough to each other for rapid interchange and for possible conversion from one type of shop to another.

8. Vocational Shops

A vocational shop complex will be provided in which students of the comprehensive high school and out-of-school youth or adult groups will be trained in particular trades (to be determined in the light of requirements of the "comprehensive high school complex"). This facility should be located close to the comprehensive high school units, with direct access to the street or other public areas.

9. Home Economics Facility

Home economics rooms for training in apartment or home decoration and furnishings, child care and home nursing will be part of a central facility. Some intermediate school children and some comprehensive high school children will utilize these rooms. These may also be used by the youth and adult center for community education. The presence of pre-kindergarten classes in the Education Park provides an extra learning opportunity for the child care course. The presence of these young children also suggests that some of their parents may wish to participate in programs conducted in the home economics suite.

10. Physical Environment Observation Center

This facility will include an instrument shelter for weather instruments, and recording wind vanes and anemometers. A cleared area (surface or rooftop) will be provided from which weather balloons may be launched. This center will also house a planetarium room and a top-floor observation station equipped with telescopes for evening observation work. Associated with this center there will be at least two full classroom spaces, and a laboratory space equipped for the study of soil samples, water analysis and geologic experiments. The classroom spaces will be separated by operable walls so as to make possible one center for large group explanations. They will adjoin or be convertible into small seminar-sized rooms. An office will likewise be provided for this center. This facility will be utilized by children from all three school levels and will provide a means of unifying their study of earth science and related science topics. Advanced students in science will have an opportunity to use this facility on an individual programmed basis under the direction of a teacher whose office will be located in it. This facility will be of great value to the after-school study center and will provide a means for evening study of astronomy by direct observation. An experimental planting area will be included, for the use of children from all school levels. This will be associated with an indoor planting facility for study of plant life.

11. Museum

A museum room will be placed in a central location accessible to the public and to children of all school levels. This museum will include space for displays in the following general areas: science (specimens, apparatus, projects, etc.); art (paintings, sculpture, graphics, etc); industrial and vocational arts; social studies.

12. Remedial Center

A center for remedial reading, mathematics and English language instruction will be provided in a central location. This center should be staffed by permanent personnel and will be equipped with materials designed for remedial instruction of children in the upper-intermediate and high school levels. It will be of use in the youth and adult center for afternoon and evening groups, including adults and out-of-school youth. The English language facility will be equipped as a foreign language laboratory with audio-visual resources for direct instruction in English.

13. Language Laboratories

Language laboratory equipment will be installed in three rooms of the central facility. These will be used by classes in the intermediate and comprehensive high school, and by individual children in the after-school program for the improvement or maintenance of language skills. These facilities will also be available for children who have discontinued the study of a language prior to graduation from high school. Use of the language laboratory facility will make it possible for these children to maintain proficiency in the language until they resume its study as college freshmen.

14. Computer Center

The Education Park will be served by a computer center through which record-keeping and program-making can be managed for all units and school levels. This center will be located near the following instructional facilities:

a. Mathematics laboratory—Here, computer mathematics will be studied by day high school, evening and summer school students. The facility will be available for qualified faculty members and adult education groups as well.

b. Commercial education computer center—Here, students will be trained in skills related to computer technology as it applies to general business needs. Advanced students in commercial courses, as well as evening, summer school or adult education groups, will use this facility.

15. Talent Group Classrooms

Four classroom spaces will be provided in a central facility for use in those talent group classes and advanced single section classes offered outside any of the units of the intermediate or comprehensive high school.

16. Student Government Rooms

Spaces for the Education Park general organization will be provided in the central facility. The student government will include representation or delegates from all units of the Education Park, and its facilities will be accessible to community groups as well. The student government facility will also include space for and representation from youth and adult center, evening high schools and summer high school student bodies. Space for the school store will also be provided in a central location.

17. Education Park Office Facilities

a. A general office for the Education Park will be provided in which the directory services for the Park are maintained. This office will also serve the following functions:

1. A communications center with central switchboard and mail room.
2. A statistical control and records section to prepare all statistical reports needed for the Park.
3. Access to a data processing room both to enter and receive information.
4. A unit to develop the school program for intermediate and comprehensive high schools. This unit must include representatives of both principals, the Education Park director, the guidance supervisor, and technical program experts who will prepare the basic data to feed into the computer on which the final programs of all units will be developed.

b. A business manager's office in which the business affairs of the Education Park will be centered. The manager will co-ordinate the budgets for all units of the Education Park and will supervise the business operations of the following units:

1. Lunch facilities.
2. Salary unit.
3. Supplies.
4. Record keeping.
5. Plant maintenance.
6. Pupil transportation.

c. Office space for the head of the Park and his secretary, with associated conference rooms, must be provided.

18. Community Rooms

Two meeting rooms will be provided for community use during the regular school day as well as the after-school hours. These rooms must be established as community, not classroom, space. Their function is to provide a setting for meetings and activities of golden-age organizations, and social or cultural groups of the general community. In addition, the following community offices will be provided:

a. An office for the principal of the youth and adult center; an office space for his assistant; an office space with file and storage and record-keeping capability for the secretary of the youth and adult center. These facilities should be located close to the main entrance of the school park facility and close to the community rooms.

b. An instructor's office in the physical education area of the school for the use of the community center physical education personnel.

Physical Education Facilities

Physical education facilities for the Education Park will be set up separately for the primary school units. It is expected that each primary school unit will have access to outdoor play space for its students and that each unit will have access also to a common area for indoor physical education activities.

The facilities for the intermediate and high school units will be planned for common use of all children at these levels, and will include certain facilities that may be used jointly by the children at both levels. Basic thinking behind the requested facilities includes the following major points:

a. That children of intermediate school age are no less in need of physical activities than the children of high school age who are scheduled for a daily period of physical education. Therefore, space should be sufficient to provide a daily period of activity for every intermediate school child.

b. That aquatic skills are essential for children who live in an area so close to beaches and inlets from Long Island Sound. Therefore, a program to teach these skills is an essential part of the physical education program.

1. Aquatic Skills Facilities

To provide aquatic skills, two facilities are requested. These are intended to provide space for all essential aquatic skills for all children registered in the Education Park at intermediate and high school levels, and for those in the community, or within reach of the park during after-school, evening and summer programs. The items requested are:

a. A training pool, of constant depth (3-4 feet), perhaps 30 feet x 60 feet in size. This is intended to provide means of familiarizing children with the water and to train them in basic water safety, floating, treading water and basic strokes. The size of this pool is sufficient to permit children to master basic water-safety techniques without fears that may be aroused in a deeper pool. The depth is sufficient for the teaching purpose and the cost of such a pool is considerably less than that for a full-sized competitive pool with provision for diving.

b. A competitive pool, with full depth at one end for diving, and standard 25-yard length. This pool will be used chiefly by high school classes, but will be open for use by advanced swimming groups from the intermediate school as well. It will be used for advanced instruction in swimming and diving, lifesaving and boating safety, and for intramural and interscholastic sports. It is anticipated that this pool will be the principal aquatic feature of the Park for recreational use by the community during after-school and summer periods.

These two facilities will develop basic and advanced water-sport skills for both intermediate and high school classes. It is planned that the pool facilities will be utilized by classes of boys and girls on an alternating basis: that is, the pool will be considered one teaching station in a cycle of physical education. The cycle will include work on the main gymnasium floors and work in one auxiliary space, with pupil capacity equal to that of the pool. The pools, then, will be jointly used by the intermediate and high school groups; while normally the training pool will be used by the younger children, some high school boys and girls will take basic training in it. This will provide especially for those beginning students in the high school who arrive from feeding schools other than those with swimming facilities.

2. Gymnasium Facilities

Gymnasium facilities for the *intermediate school* children should include the following basic elements:

a. A standard, divisible school gymnasium facility with locker rooms for both girls and boys and separate access to the gym floor by children of either sex. This gymnasium should have a high ceiling, sufficient to accommodate basketball or volleyball games.

b. A separate auxiliary gymnasium facility with standard ceiling height, in which such activities as dancing and physical fitness training may be conducted. This auxiliary facility will be utilized in cycles with the training pool.

Gymnasium facilities for the *high school* children will include the following:

a. Standard-height gymnasia for boys and girls. It will be necessary for these to be separated for access and for one of them to have separate access from a visiting team dressing room. Interscholastic basketball should be possible either in the boys' gym or by combining the two gymnasia.

b. Two separate facilities with standard ceiling height, for use by boys and girls in cycles with the pool. These auxiliary facilities will be used for physical fitness development, weight and apparatus work, dancing, golf and other instruction. The proximity to a public golf course suggests that golf training would be a useful addition to the physical education training program, for it provides realistic opportunity for continued participation in the sport.

3. Outdoor Athletic Spaces

Playing fields have been requested for the primary school units, clearly separated from the facilities requested for other scholastic levels. Playing fields for the intermediate school children should be separated from the athletic fields provided for the high school boys and girls. The outdoor space at the Education Park can be perhaps more fully utilized for athletic space than in conventional school sites because the location at Co-op City provides a landscape area already developed adjoining the school sites. To the maximum extent possible, the following playing areas should be provided:

a. A combination football-soccer field, with a 440-yard all-weather track surrounding it.

b. A field for girls' sports such as field hockey.

c. A standard baseball field.

d. Hardtop areas on which such court games as basketball, handball, tennis and volleyball may be played. These areas should be so designed that they can be flooded for ice-skating in winter, and should be illuminated so that the surface can be used for evening sports activities year-round, and for summertime dancing for those in the youth and adult center.

4. Field House

It is requested that a simple field house be provided, with dirt floor and no special interior appointments. This should have access to the locker rooms for the high school children. It will be used for intra-mural sports, interscholastic team training and auxiliary gymnasium facilities. The field house may be designed to contain some of the facilities requested above for indoor or outdoor athletic and/or gymnasium use, depending on cost analysis.

5. Joint Facilities

Several facilities can be jointly used by both intermediate and high school children, or faculty members. Among these, the following seem most essential:

a. A training space for individual health teaching, or development of boys and girls whose physical development does not warrant assignment to regular gymnasium classes. One such space should suffice for both sexes, at both school levels, perhaps assigned two periods per day to boys and girls of each school level.

b. A classroom suite for health teaching. Four classrooms will be necessary for this instructional area, and these should be located in close proximity to each other for ease in communication among the teachers, possible development of team teaching techniques and sharing of instructional media.

c. Office space for a coordinator of physical education and health education for the Education Park, as well as offices for faculty members and chairmen of health departments, will be centrally located to improve the articulation of health education teaching within the Education Park. Office space for community center personnel assigned to the youth and adult center will also be necessary.

6. Community Relations

The physical education facilities will provide an important link to the community, and a means by which community youth will be encouraged to participate in after-school programs. The presence of Rice Stadium at Pelham Bay Park, near the site of this Education Park, will make it unnecessary for the school itself to provide a stadium for interscholastic sports. It is understood that Rice Stadium is to be rehabilitated and will be available for the interscholastic teams that may represent the Education Park.

While interscholastic sports will be part of the program at the Education Park, the unit structure of the intermediate school and high school makes a form of intra-mural sports most attractive. It is planned that children's programs will assign them to gym with others of their own units; hence the intra-mural sports will be especially attractive. Since the widest possible participation is sought, the addition of a field house for interscholastic and/or intra-mural sports would be an especially valuable part of the Education Park's equipment for physical education.

Communications System

The internal communications system of the Education Park will consist of two parts. One of these will involve telephone communications which should be provided through a central switchboard and PBX system capable of providing intercom service as well as direct receipt of calls from outside the Park. It is recommended that a telephone conduit be installed connecting all instructional areas of the Park, so that when cable-carried educational programs are available, these programs can be utilized in the instructional spaces without overhauling the walls and ceilings of the buildings.

The second part of the communications system will involve a central audio-visual control system. This will include a public address-type connection by which radio programs, tapes or records can be broadcast into the individual instructional spaces of the school, into the resource centers and into study carrels. This system presupposes that there will be a number of tape decks and pick-up facilities so that a large number of programs can be piped simultaneously to different receiving locations.

There will also be closed-circuit and open-circuit television systems. The open-circuit TV for commercial channels can be dialed directly from classroom receiving sets to be located in each instructional area. Closed-circuit telecasting facilities should be provided in all instructional areas of the Education Park in addition to the auditorium and little theatre. In addition, there should be a studio facility adjoining the communications center in which programs or taped lessons can be prepared. The TV pick-up facilities should include portable cameras that can be installed in various classrooms or instructional spaces so that a bank of lessons can be developed on tape for future instructional purposes and for the improvement of instruction. Tapes of such lessons, other television programs and instructional motion pictures should be available so that a teacher in any part of the Education

Park can have access on request to the entire bank of films or taped instructional material. This material would be displayed in the classrooms on television facilities.

The communications center, then, will include the following facilities:

1. An audio control center for the public address system with associated audio tapes, records, FM and AM radio pick-ups, and conventional public address system equipment.
2. A television control facility for the distribution of closed-circuit programs, video-taped programs and educational motion picture clips on the request of teaching personnel.
3. A studio facility for the preparation of television instructional materials. This facility should include equipment for making tapes from TV programs produced in instructional areas.
4. Storage facility for the audio and video materials.
5. A graphics center in which visual instructional materials such as charts, overhead transparencies, etc., can be produced.
6. An office for the director of the communications center with enough secretarial space for the management of the center, and for the production of mimeographed or offset master copies of catalogs and guides to the audio-visual resources.

Library Facilities

The library resources of the Education Park will be very extensive because of the size of the Park population, and because of the growing emphasis on the use of library resources and facilities in the school programs. The growing number of non-library resources that are part of the reference centers and individual study carrels suggests that apparatus of a technical nature, and materials such as those provided by the communications center, will be part of the instructional resources used by children in resource centers. Library facilities and the professional service of library teachers will be essential in these resource centers.

The unit system of organization which the Education Park utilizes provides for a resource center in each intermediate school and comprehensive high school unit. These resource centers should be so located that pairs of them are close to each other for a quick interchange of library and other resource material. A single office will be provided for each pair of resource centers. Each resource center will have its own reading rooms, reference section, card catalog and checking desk area. The non-professional work associated with processing and repairing library books will be performed in space located at the supply center of the Education Park. For this purpose, supervisory responsibility will be allotted to one member of the Education Park library staff. Each primary school library reading room will be located and planned to serve two primary school units.

The instructional materials center will include a reference library facility for student use and a professional library for the faculty. It will also house the head librarian of the Education Park facility.

It is expected that the library teachers, freed from non-professional chores, will be able to give more complete service on the professional level to students and to their faculty colleagues. The library service for the youth and adult center, and for the evening and summer school activities, should be under the same direction as the library service of the Education Park's day school libraries. In this way, the needs of the non-day school clientele can be evaluated and served most effectively, and the possibilities of disagreement or lack of communication will be eliminated.

Science-Laboratory Facilities

1. Primary School

Facilities

No special facilities in the form of science rooms are called for in the primary school portion of the Park. Instead, each primary school classroom must have sink facilities with running hot and cold water, drainage and electric outlets near this facility. Each cluster of primary classrooms requires storage closets for science apparatus of a simple nature, such as glass jars, potting materials or rudimentary electric apparatus. Each classroom should have provision for open-shelf overnight storage of science projects that children might be working on. There should be an impervious finish on the table-tops of the children's work tables. There should be water and electrical utilities available in the cluster instructional center.

Function

It is anticipated that science instruction will take place largely within the primary classroom or within classroom groups that may work out-of-doors. Some science instruction will take place in medium to large groups (one class or more), probably under the direction of a science teacher who will come to the group under instuction. Hence, there should be provision for storage of his materials and for demonstrations by this teacher in the cluster instructional center. Since much of the primary science program will continue to involve pupils in individual and/or group projects, space for conducting these is needed, and "child-proof" desk or table tops will be necessary. Many of these projects may run over periods of time (e.g., study of plant growth or observation of a pet animal), so shelves near sunny windows are desirable (these might well be insulated from heat sources such as radiators or vents). Wherever possible, access to the outdoors and school garden should be provided from each group of classrooms.

2. Intermediate School

Facilities

For the younger pupils in the intermediate school, a separate science work area should be set up to service each group of five to seven classes. This area should have provision for television reception, projection by various media, display cases for objects under study and seating areas for pupils.

Each classroom will have running water and electric current, with project space available in which individuals or groups may conduct science projects in a certain amount of privacy, but under observation by their teachers. Closet or cabinet space will be necessary for science equipment in class use, and, as in the primary school, it is expected that pupil work tables will be the setting for much science activity.

For the older pupils in the intermediate school, science complexes will be necessary. These should consist of laboratory-demonstration rooms, science demonstration classrooms and general classroom space for science instruction. Science storage space and laboratory preparation rooms should be provided with each science complex. Utility lines should be so designed that the science demonstration classroom may eventually be converted into a laboratory-classroom, and that the general classroom may be converted into a science demonstration classroom. These science complexes should have provision for combining the laboratory room and the demonstration-classrooms into one for large-group instruction.

Individual project space should be provided in each science complex, to provide space for 10% of the pupil population to work on individual or group projects outside of general laboratory rooms. This space should be under visual control of science teachers or laboratory assistants. In the same area, individual laboratory-table carrels should be provided for each faculty member in the science complex.

Function

The transition from almost completely self-contained science instruction to almost completely departmentalized instruction will take place in the intermediate school. Hence, at the early years of this school, science instruction will take place largely within the classroom or in the adjoining science area. At the later intermediate years, science instruction will take place in a more formal manner, utilizing the facilities of the science complex. Younger children capable of benefiting from the latter type of instruction will be permitted to utilize the "upper" facilities.

Much of the instruction and science activity will still involve the use of science concepts closely related to content of other areas, such as social studies. Many individual and group projects may be underway, and space must be provided in which such work can be conducted more or less independently and separate from the work area of classmates. Teachers should have space in which to conduct individual projects with children, to review apparatus and/or equipment with them, and to prepare lessons or demonstrations undisturbed by others: hence, cubicles for teachers in the individual work-area will provide not merely visual control of the work-area, but space for teachers' offices as well.

Some of the pupils will utilize science materials drawn from the supply room for home or outside school use. The science supply room will provide access to such materials, as well as a means of storing projects or demonstration materials temporarily. Laboratory facilities should be flexible enough to provide for groups of up to five or six pupils each to work occasionally on projects, and for individuals or teams of two to function most of the time. Furthermore, laboratory facilities should be so designed as to permit rearrangement of much of the equipment as demands change.

3. Comprehensive High School

Facilities

Science demonstration classrooms should be provided with closed-circuit television capabilities. The cameras should be able to cover the entire front or demonstration portion of the room, and classroom monitor sets should be large enough and numerous enough to provide each student with a direct view of the screen. Each of these rooms (so equipped) should be located centrally so that the adjoining demonstration classroom can be combined with it for large group instructional purposes.

General classroom spaces should be located next to demonstration rooms and should be divisible into two or more seminar-type rooms to house groups up to 15 in number. Demonstration classrooms should be built with utilities already installed so that they may eventually be converted into laboratory-type rooms. These utilities lines should include not only water, waste and electric power, but gas and empty conduit lines which might be utilized for telephone cables or compressed air. Venting by positive means is necessary for all laboratory rooms, and should be provided in such a manner that demonstration classrooms and general rooms might be added to the venting system in the future without serious structural change.

Preparation rooms should have direct access to both laboratories and demonstration rooms. Individual study stations for 10% of the rated capacity of the classrooms and demonstration classrooms should be provided with laboratory-type utilities and teacher stations. These study stations should not be assembled in larger numbers than ten at any one location and should be interspersed with teacher carrels.

Functions

It is expected that all pupils will study the minimum of two years of science and that academic or general diploma candidates will study an average of 1.5 years of science beyond that minimum. In the comprehensive high school, pupils will be encouraged to conduct individual and/or small group experimental studies, and to conduct relatively lengthy science projects; hence, facilities for conducting and storing these projects will be necessary. Ultimately, it is expected that the most talented science students will be conducting virtually individual course work or pursuing individual science topics in the central science facility of the Park. Individual work-areas will be available beyond the normal school day for some of these purposes, and pupils will utilize pieces of science equipment in such work both in school and outside school.

Faculty members will be more numerous than in the intermediate school and provision for sub-professional or non-professional personnel is necessary: laboratory assistants, school aides, etc. Provision for each of these must be made in the preparation rooms, department offices or laboratory-classrooms. Space for faculty members to meet in small groups, for teaching teams or for similar purposes must be provided: a larger room may be subdivided for this purpose, or three or four teacher-carrels may be grouped together to achieve this end.

Pupil Personnel Service Center

The pupil personnel service center will be centrally located for accessibility to the public as well as to the various school units of the Education Park. It will consist of the following facilities:

1. *Medical Suite:* This facility will provide space for all school health service functions for all units of the Park with the exception of first-aid and emergency room services. These will be provided in space associated with the school gymnasiums. Sufficient space should be provided for the following:

a. Three offices for school nurses with associated examining rooms.

b. One secretarial-type office for the medical secretary. Access should be provided to the central school records.

c. One dental office.

d. A waiting room sufficient to seat up to 20 people comfortably, with access to the nurses' offices, examination rooms and dental office.

The approximate areas requested are as follows:

Examination rooms	3 @ 375 sq. ft.	1,125 sq. ft.
Dental office	1 @ 190 sq. ft.	190 sq. ft.
Secretary's office	1 @ 375 sq. ft.	375 sq. ft.
Waiting rooms	1 @ 375 sq. ft.	375 sq. ft.
		2,065 sq. ft.

2. *Guidance Suite:* This facility will provide specialized guidance services for the children registered in the Education Park, and on referral, for children in near-by schools. In addition, some guidance services will be provided for out-of-school use and for adults in the community interested in vocational or occupational retrain-

ing. The office facilities required are for the following purposes:

a. Scholarship and financial aid for college-bound students.

b. Vocational counseling and placement service for students intending to go directly to work.

c. Guidance service for out-of-school youth and adults.

d. Provision for a Bureau of Child Guidance team, including psychologists, school social workers, etc.

e. A waiting room and reception room sufficient to seat up to 20 people comfortably, with access to these other office areas.

3. Office space for the supervisor of guidance assigned to the Education Park should be provided in the pupil personnel service center.

4. Pupil records must be available to the pupil personnel service center. Therefore, a secretarial-type office with access to the Education Park's computerized record service is necessary. This office must be capable of producing and mailing transcripts of records of all children who attend or have attended schools in the Education Park.

5. Provision should be made for an office for the attendance teacher assigned to the Education Park.

6. An administrator of pupil personnel service, responsible to the head of the education park, will have an office in the pupil personnel service center. This official will coordinate and schedule the services provided at the pupil personnel service center, and will supervise the operation of the record service. He will also be authorized to authenticate transcripts of student records.

Central Supply Facility

The Education Park will process vast quantities of supplies of different kinds. It is planned that a single supply center will be established in which the supply functions of the various levels of the Park can be carried on, and in which certain types of on-site maintenance and repair work can be conducted to increase the efficiency with which all units of the Park can function.

The functions of the supply center will include the following:

1. Inventory and requisition.
2. Reception.
3. Storage.
4. Issuance and delivery of supplies.

A warehouse type facility approximately 75 feet x 100 feet on one level is needed for the handling of supplies. There must be facilities for unloading trucks at one end of this warehouse, and a facility for delivery and distribution at the opposite end. All materials except food will be received in this warehouse facility: these include custodial supplies, general and specialized school supplies, library books and text books.

This center will provide the following services to all using personnel:

1. Inventory of supplies and equipment in all categories.

2. Central requisition and preparation of requisition forms, maintaining records of material requisitioned and back-ordered.

3. Receiving and acknowledging receipt of all books and supplies. Discrepancies will be noted and followed up by this center. Textbooks and other material will be prepared for issuance to children by being properly stamped, numbered and supplied with book labels.

4. Bills will be passed for payment through this center.

5. A "pick and pack" service will be provided for all using agencies (school offices, teachers, department chairmen, custodians, etc.) according to their requests.

6. Materials requested will be delivered by supply personnel to the point of use (classroom, office, laboratory or gymnasium).

7. Pick-up and transfer services will be supplied for the interchange of supply material.

8. All necessary supply records, reports and controls will be serviced at the supply center.

It is recommended that the supply center be staffed by non-professional personnel. These personnel should be, however, specially trained to handle their own supply functions. The supply center will be headed by a storekeeper who will be responsible for overseeing the operation. A secretary assigned to the storekeeper will assist him in preparing rcquisitions, handling reecipts, and performing other clerical functions.

Adjoining the supply warehouse will be storage facilities for mobile custodial equipment (e.g. snowplows) and light delivery vehicles for the supply service. Facilities for minor repairs on this equipment will be needed unless a transportation shop is included in the Park's industrial arts or vocational complexes.

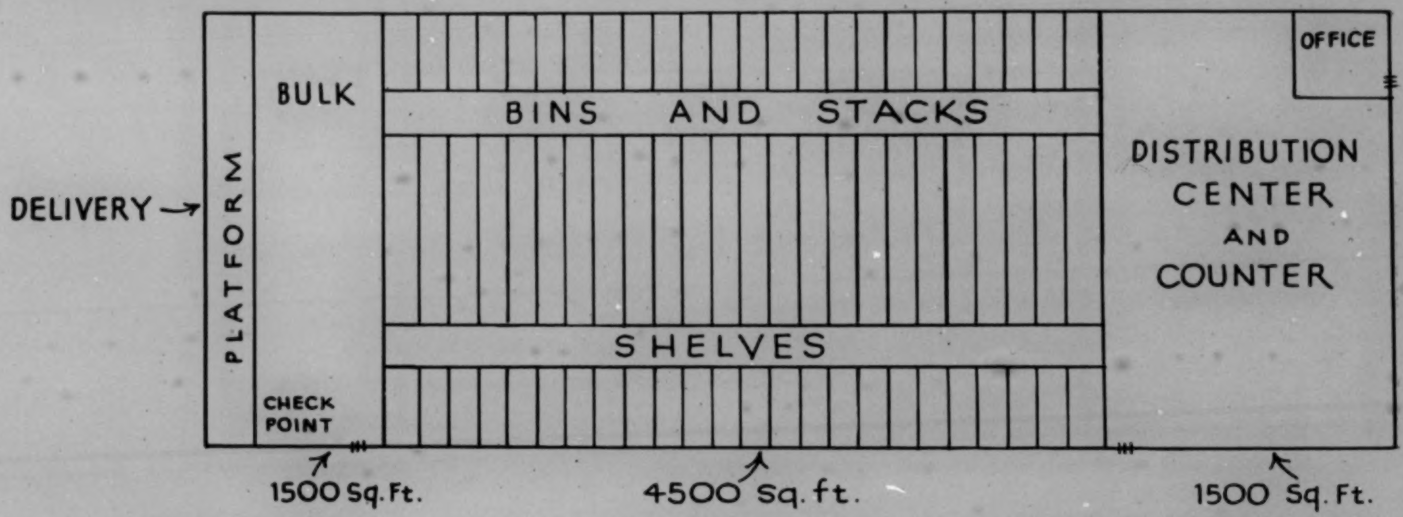
Connected to this warehouse facility (either on a second floor or in additional space) bookrooms and a library workroom will be established. The bookrooms should be capable of storing reserve textbooks from all three school levels.

The bookrooms will also have a work area in which textbooks may be inspected and undergo minor repairs.

The library workroom will possess work areas sufficient to process library books for all library units or resource centers in the Education Park. This service will be conducted by non-professional personnel assigned to the supply center, under the direction of a member of the library staff attached to the Education Park.

A central repair shop for audio-visual equipment will also be located in the supply center. A technician assigned to this shop will be responsible for repairing and servicing the audio-visual equipment assigned to the Education Park and all its units and will be responsible for maintaining the operation of the communications system of the Education Park.

A schematic diagram of the warehouse facilities appears below.



Food Service

It is planned that food service for the Education Park units will be provided through a number of separated eating areas. Each of these eating areas is intended to serve one unit of the Park. Pairs of eating areas will be served from a single kitchen. The kitchens will operate with frozen foods, and those in the comprehensive high school facility will also provide for snack bar type service of such optional items as beverages, ice cream, sandwich or dessert selections.

Children assigned to each unit will have lunch periods in groups of up to 350 at a time. It is planned that there will be three lunch periods in the intermediate and high school, and two in the primary school. However, the lunch facility must be planned with the possibility in mind that continuous lunch service will be called for in the future if the program requirements of the schools change into some module other than the 40-45 minute periods.

The facilities in which children will eat should be designed basically as instructional spaces, with good acoustics and impervious desk- or tabletops. The plan is for the children to eat in spaces designed primarily as instructional areas, rather than to undergo some instruction in an area primarily designed as a cafeteria. It is planned to divide the total number of children eating lunch in any one unit by keeping operable walls closed. As a result, children will actually eat with a social group of up to 175 schoolmates in the same lunch area at the same time.

There will be two faculty lunch rooms. It is intended that faculty and staff members of all three school levels will have access to these lunch facilities, and that the opportunity to break bread together will lead not only to social but to educational interchange among teachers on all three levels. The faculty lunch facility should be planned as a lounge-type room in as informal and attractive a manner as possible. These faculty lunch rooms will be usable as conference and lounge rooms during the school day.

Each faculty lunch room should be able to handle up to 125 staff members at a single seating. The lunch rooms should be so located as to be able to attract staff members from all three school levels.

Outdoor Facilities

Transportation to and from the Education Park requires the presence of a bus loading facility accessible to each of the units of the schools in the Park. The bus loading facility should be sheltered from the weather, and should open into primary school commons areas or the large group areas of the intermediate and high schools. It will be necessary to provide space for buses to be parked and to turn around, or to have a continuous driveway with one entrance and one exit.

An access route is needed for trucks to reach the supply center. This should be located separate from the bus loading area. It is necessary for a roadway, or combination roadway and path, to connect the supply center with one entrance to each unit of the Education Park for the delivery of supplies and food to the kitchen.

A parking area will be necessary for faculty cars during the school day, and for the use of the community in afternoon or evening hours. While the residents of Co-op City will be able to park their cars in Co-op City garages, it is essential to provide parking spaces for people served by the Education Park who do not reside in the development.

The *landscape plan* for the Education Park must harmonize with that of the Co-op City area and should include provision for the following two features:

1. Plantings should include specimens of trees and shrubs native to the region, clearly identified by scientific and popular names. These plantings will be part of the learning environment. It is desirable that provisions be included in the landscaping plan for addition of certain specimens on an annual basis during the years of operation of the Education Park.

2. The plantings should be so arranged as to include trees, shrubs, perennials and certain areas for beds of annual plants. These should be so planned that some landscape features will be in flower at any time during the growing seasons. The annual beds and borders may be tended by school garden groups and by community groups during the actual operation of the Education Park.

Highlights Of the Education Park Plan

The Education Park plan offers a number of advantages to those it serves and to those who serve in it. Following are some of the outstanding features or contributions made by the Education Park to the people it serves:

I. The Pupils

1. A natural environment for constructive integration.
2. An opportunity through non-grading to move at their individual rates through curriculum areas.
3. An opportunity to work in some activities with children of other school levels.
4. An opportunity to use special facilities that might not otherwise be available (e.g. planetarium, weather station, little theatre, arts facilities).
5. Improved guidance and health services.
6. Improved articulation of learning through a continuously planned program of instruction covering grades pre-K through 12, and coordinated on the same site within the same general school organization.
7. Identification with school units of a size that is modest by New York City standards within a general facility that is significantly larger than a normal New York City school.

II. The Parents

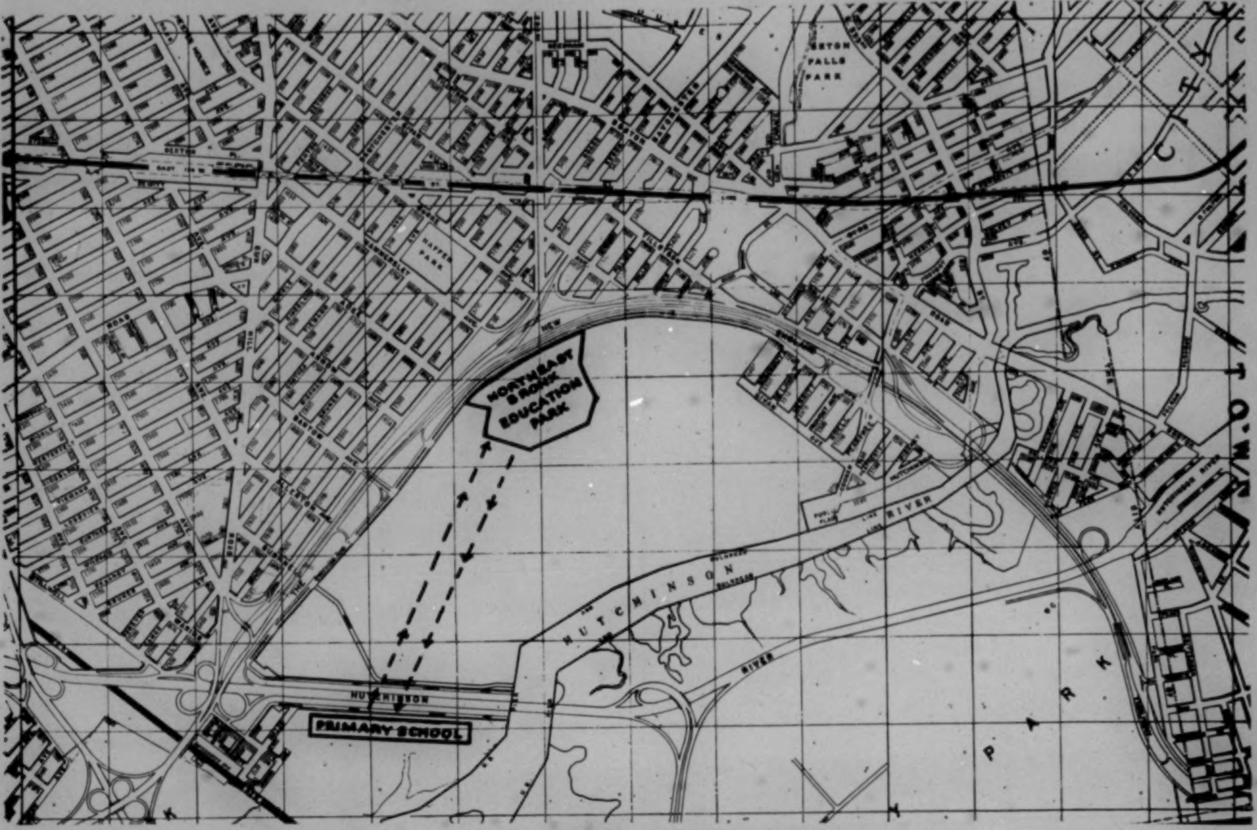
1. Convenience and improved opportunity to become familiar with the school attended by their children in one basic location.
2. Security in the knowledge that pupil weaknesses and strengths will be served by a wider span of professional expertise and with a wider variety of materials than the conventional school permits.
3. Greater certitude of continuity of school program from one school level to another.
4. Improved opportunity to take part in parent education activities in facilities planned for the purpose.
5. Greater opportunity to participate in social, recreational, and organizational activity with parents of diverse backgrounds.

III. The Professional Staff

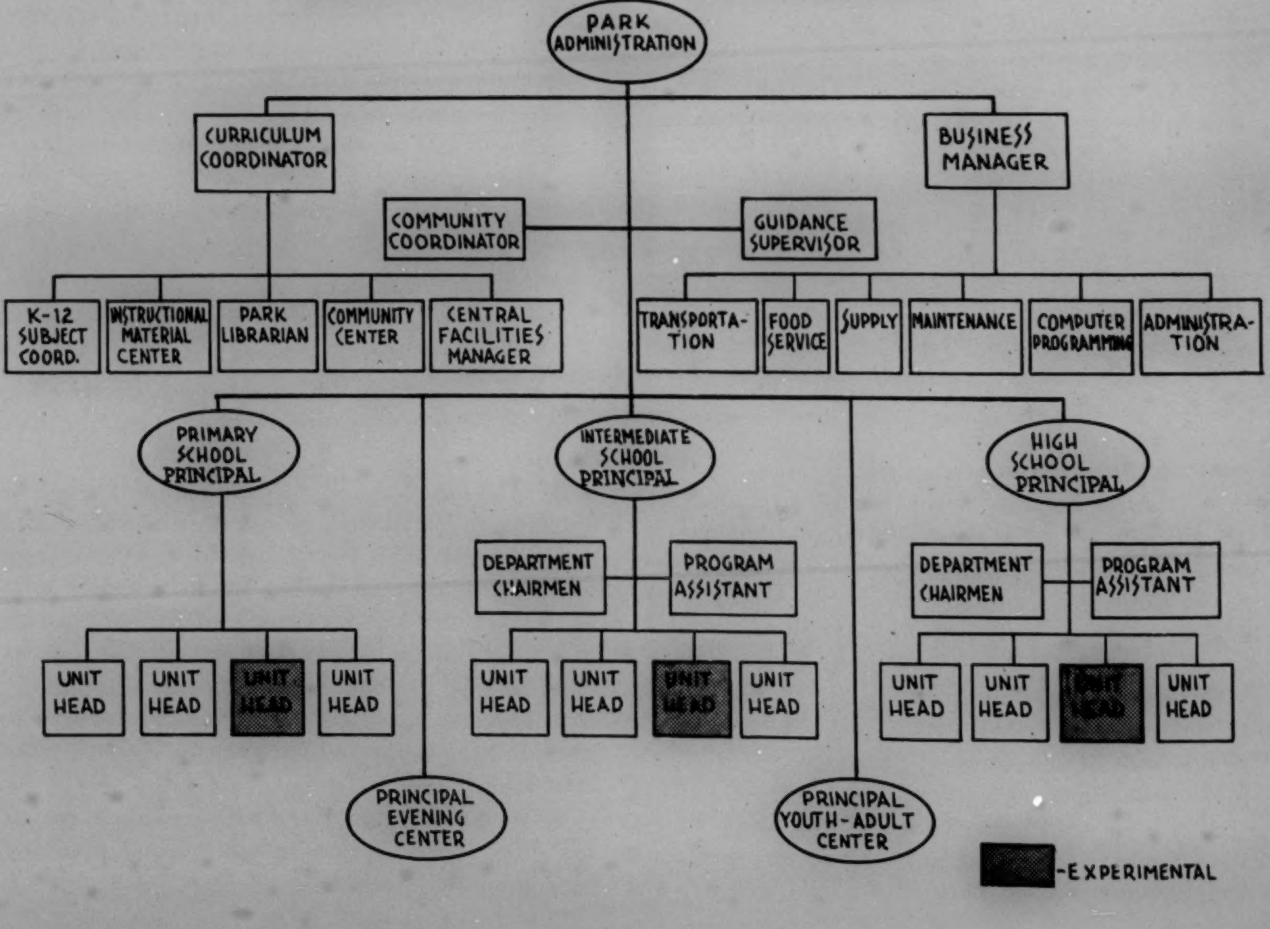
1. Greater variety of instructional materials and physical resources for instruction.
2. Articulation of curriculum and administrative responsibilities by having these concentrated in an administrative service and supply center.
3. Improved opportunity to work with staff members from other school levels.
4. Improved curriculum services and supervisory services, with a greater degree of articulation among the levels and an opportunity to provide more individualized service to the students.
5. The presence of one experimental unit at each level will provide an opportunity for innovation in curriculum, administration and other professional areas in a situation in which a number of parallel "control" groups are available.

IV. The Community

1. More efficient and economical operation of the Education Park will yield more effective returns for the education dollar spent in this facility.
2. The presence of the Education Park will warrant the inclusion of many school facilities not otherwise available in individual schools, and will provide an opportunity for field testing educational materials, learning systems and architectural features for possible use in other parts of the school system.
3. Special facilities as described above will be provided for the broad community served by the Education Park.
4. The Education Park will provide a means for direct participation in educational planning by community leaders.


NORTHEAST BRONX EDUCATION PARK
PRIMARY SCHOOL
HUTCHINSON RIVER
PARK
SETON FALLS PARK

Administrative Relationships


PARK ADMINISTRATION
CURRICULUM COORDINATOR
BUSINESS MANAGER
COMMUNITY COORDINATOR
GUIDANCE SUPERVISOR
K-12 SUBJECT COORD.
INSTRUCTIONAL MATERIAL CENTER
PARK LIBRARIAN
COMMUNITY CENTER
CENTRAL FACILITIES MANAGER
TRANSPORTATION
FOOD SERVICE
SUPPLY
MAINTENANCE
COMPUTER PROGRAMMING
ADMINISTRATION
PRIMARY SCHOOL PRINCIPAL
INTERMEDIATE SCHOOL PRINCIPAL
HIGH SCHOOL PRINCIPAL
DEPARTMENT CHAIRMEN
PROGRAM ASSISTANT
DEPARTMENT CHAIRMEN
PROGRAM ASSISTANT
UNIT HEAD
UNIT HEAD
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UNIT HEAD
UNIT HEAD
UNIT HEAD
UNIT HEAD
UNIT HEAD
PRINCIPAL EVENING CENTER
PRINCIPAL YOUTH-ADULT CENTER
▨ -EXPERIMENTAL

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Appendices:

- Park Plan of Organization
- Planning Classrooms and Auxiliary Spaces
- The Community School and the Park
- The Arts — Fine and Applied
- Instructional Materials Center
- Health Education

APPENDIX I

PARK PLAN OF ORGANIZATION

By CYRIL G. SARGENT

In planning facilities for 10,000 pupils one of the important questions which emerges early is that of organization. Not only are we dealing with a very large total number of pupils, but we may well find that a very large portion of this number will experience 13 or 14 years of schooling in one place. Co-op City represents home ownership and it would appear that population mobility might well be less than in areas dominated by rental property.

This in itself represents a significant change in the patterns of schooling which most children have experienced in the past. For most there have been three changes of schools, three enlargements of social contacts and companions, and three expansions of paths to school and school environments. For some, this has still meant a relatively restricted increase in range and variety, but for others, particularly at the high school level, it has meant a completely different set of social relationships, intellectual conditions and even images of the city and their own world. The opportunity to elect or compete for admission to the specialized high schools will, of course, still be present, and perhaps if the Park program itself achieves some degree of superiority in one or more fields the possibility might emerge of a large part of the high school group of the Park going to other schools with other city groups being brought in for certain specialized training during the high school period.

But for the present the assumption is made that many will stay. For these, the Park in organizational pattern, physical space and total site design must seek to provide conditions conducive to the achievement of a personal identity, an effective pattern of social relationships and clearly defined maturational sequences—this latter not only in terms of intellectual tasks but also in terms of social relationships and physical space. What this means is that the "standard" 1,200-pupil elementary, 1,800-pupil intermediate and 4,000-pupil senior high school may not constitute appropriate organizational units for a really massive school population of 10,000 pupils. Without prior park-type experience to rely on we would do well to run the risk of overemphasizing individual needs to protect against the regimentation of size, and to reduce by variety and scale the feeling of mass, crowd and sameness.

Organization should of course be determined essentially in terms of instructional goals of the school—both intellectual and social. It should be chosen so as to carry out effectively and efficiently the tasks of the institution.

Unfortunately there are no very comprehensive theories or formulations about organization. To some it is essentially communications, to others control, and to others the important product is "organizational climate." Moreover, organization is intimately related to particular institutional goals. And since in education the individual with his needs, aspirations and talents is preeminent, any organizational scheme should seek to maximize the potential for individual development.

Organization in this memorandum will be viewed from two points of view, which are essentially parts of the same question of how to organize for effective teaching and learning but they relate to different magnitudes. The first is concerned directly with interaction between pupils and teachers; the second with relationships between larger aggregates of pupils and teachers together with supplementary supervisory and counseling personnel. Both are related of course to the organization of space.

1. Organization for Learning and Instruction

If one considers the full range of appropriate grouping between pupils and staff the scale would go from "0"—a single pupil alone in his own pursuit of knowledge or skill—to an entire grade or more assembled in an auditorium to hear a talk by an outside speaker or the discussion of a topic of general concern led by the principal. Table I suggests some of the possible patterns.

TABLE I

Pupils	*Teachers*
1	0
1	1
5-10	1
20-30	1
75-150	3-5 (in teams)
200 and over	1-15

The school organization (and plant) should make it possible to accommodate all or most of these arrangements. The pupil "alone" can be provided for by the study carrel in the resource center, the library or the advanced science laboratory. The one-to-one relationship between student and teacher or student and counselor is provided for by teachers' offices, guidance spaces and the like. The group of 5-10 would require small 350-400 square feet seminar type rooms, the 20-30 size groups the standard classroom and the 75-150 a large group instruction area appropriately designed for this number of pupils. Larger groups would ideally be located in an auditorium which might be divisible to accommodate groups of 200 or more as well as the full capacity of the hall.

An opportunity—and a need—appears present in planning the Park to provide an important expanded emphasis on the 0-1, 1-1 and small group situations. The need stems from the problem of regimentation which affects most large scale operations; the opportunity from this same large scale, for this may make possible some economies of space which can be taken advantage of for more carrels, offices, small seminar or conference areas and the like. Subsequent quantitative analysis can test this out.

Organization for variety in instructional relationships has been shown to be a complicated process. It requires not only a computer-controlled scheduling of space, pupil and teacher schedules, but more important, a new pattern of professional relationships among teachers themselves. It would seem however that in a school of the Park's dimensions, some spaces should be definitely planned for and designed as large-group instructional areas, and some as small-group spaces. In the former particularly, the usual opening-up of two classrooms to make one large area is usually less than satisfactory because of sight lines, demonstration requirements and group discussion needs.

Some rationale is needed for determining the number of special spaces needed initially which can be specifically designed as such. Then specifications indicating possible future directions and needs can be stated so that flexibility is built in the design, although this "future" space will be somewhat less satisfactory. Unfortunately it appears that there is no presently available design solution to universal classroom space.

The following is an illustrative example of one approach to planning for organization which requires groups varied in size. Taking the 1966 register figures for Erasmus Hall High School and pro-rating them for 4,000 we have the following total number of instructional hours per week in each of the major academic areas (Table II).

TABLE II

Subject	*Hours per Week*
English	21,510
Language	18,990
Social Studies	12,345
Mathematics	11,730
Science*	14,347
Total	78,922

*Physics and chemistry at 7 hrs./wk.

Using a utilization factor of 85%, this number of hours of instruction would require 63 regular non-specialized classrooms and 14 lab-lecture science rooms.

If it is established, for example, that 10% of a student's class time on the average will be spent in large group instruction, 80% in the "standard" classroom group and 10% in the small group seminar type of activity, the weekly instructional time would require the following number of spaces (exclusive of science).

Size	*Utilization Factor*	*No. of Spaces*
Large Groups	40%	5
Standard Groups	85%	50
Seminar Groups	85%	23

We can apply this method to the general analysis of space requests once we have established the initial "norms" for organizational patterns of instruction.

2. Organization for Supervision, Administration and Control

The Primary School

Two assumptions will be made:

1) that there will be a continuing emphasis on non-grading, and

2) that teachers will increasingly work together. Whether this effort results in full-fledged teaching teams or more modest cooperative arrangements, the solitary teacher in his or her single classroom seems bound to give way to more flexible arrangements.

It seems reasonable first to continue to separate out the kindergarten and pre-kindergarten for special consideration. The kindergarten has regularly been so separated physically and has frequently had its special play space as well. There are well justified determinations, for many children at this stage of socialization are not ready to protect their "turf" or to engage in larger group activities. This would be all the more true for the "pre-K" children. What is proposed therefore is a grouping of pre-kindergarten and kindergarten space somewhat separate from the rest of the Park.

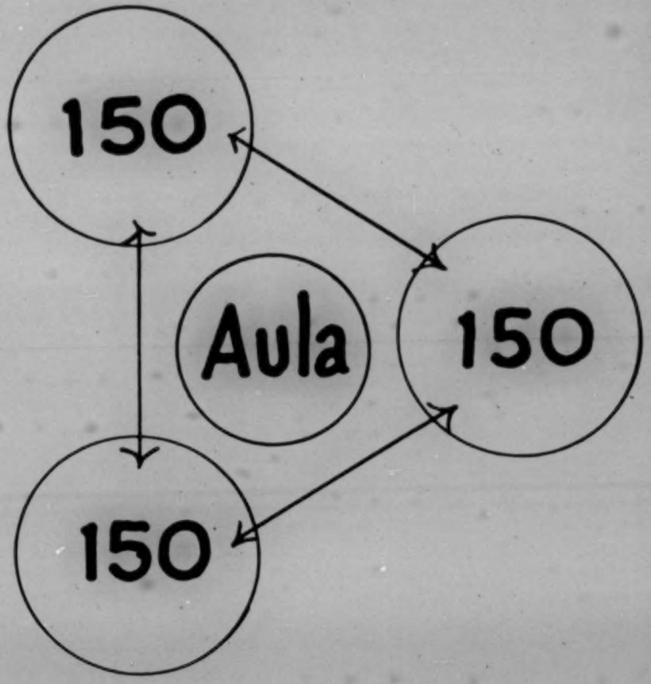
If we assume that there are to be 480 kindergarten children we will need 10 kindergarten classrooms. With these we can cluster the proposed 13 classrooms for the pre-kindergarten children. These spaces should include conference areas for parents and generous storage areas—but the exact specifications must come later. Except for jurisdictional problems, these pre-kindergarten and kindergarten rooms might very appropriately be dispersed among the housing units themselves, for this creates a sort of transitional space, relates to the home and encourages the participation of the parents.

For the primary school, grades 1-4, we might then think of groupings of 150 pupils and five teachers as constituting in the primary school a basic unit or organizational building block, since experience with collaborative teaching suggests groupings of no fewer than three nor more than six.

This unit of 150 also seems reasonable in terms of the social roles of the primary school child and his expanding span of social interactions. It is a small enough grouping for him to know everyone somewhat and a reasonably larger number very well. (It might be better to consider this group as made up of 120 pupils and four teachers, with the thought that if at some future date, the recommended pupil-teacher ratio of 25-to-1 is implemented, an additional teacher could be added to the unit and still keep the total number of teachers to five.

Since most of the primary school activities will be conducted within what might be called general space we need very little beyond the requirement of clustering classrooms so as to achieve the variety called for in team teaching. Such special space as is needed might be in the form of an aula and consist of an indoor play-area, which could also serve as a small auditorium and as an eating space. This aula could serve three of the basic units and together these three units could form a "school" of 450 pupils and 15 teachers (Figure I).

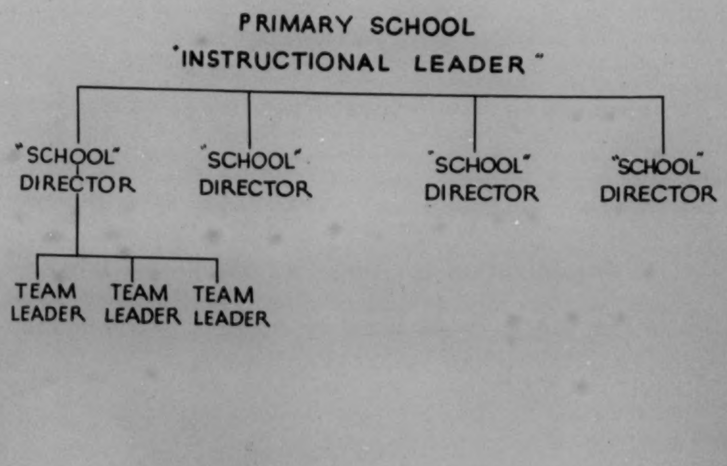
FIGURE I



This larger organizational unit would, for administrative and supervisory purposes, be relatively complete. It would have a hierarchy of staff roles, culminating in that of an "instructional leader" who would be responsible for the full range of activities and would also be at a node of the communications-linkage system of the entire park complex (Figure II).

FIGURE II

STAFF ORGANIZATION



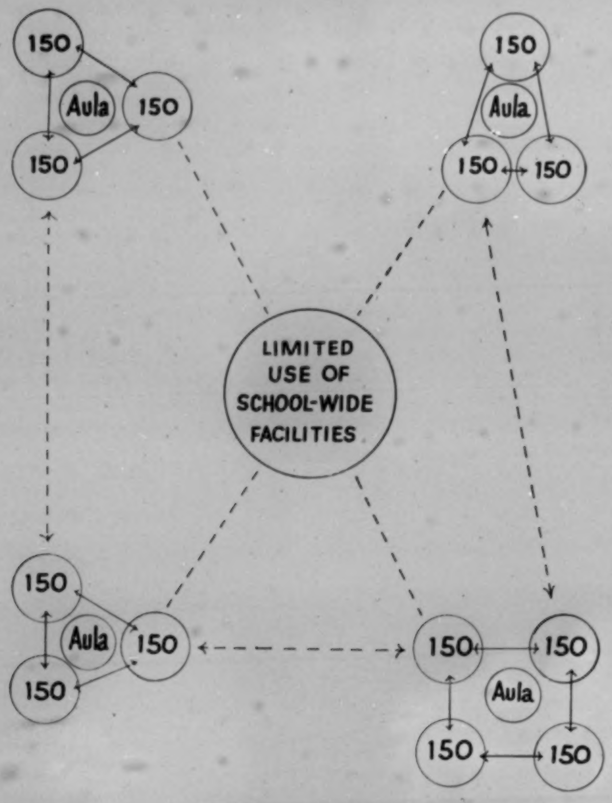
We would then have the following:

a) 150 x 3 = 450 (a "school")
450 x 3 = 1,350
600 x 1 = 600 (or 2 at 300)

Total 1,950

Schematically the primary units might be represented thus:

FIGURE III



Or if 120 is chosen as the basic unit then

b) 120 x 4 = 480
480 x 4 = 1,920

This latter grouping would be expressed schematically in essentially the same fashion but each "school" would have four units of 120 pupils each.

The Middle School

Using the same approach for the middle school we can expand the basic unit in terms both of a wider span of social interaction among older pupils with increasingly structured activities and roles. The need for some specialized teaching personnel, equipment and spaces also argues for a larger grouping of pupils and staff.

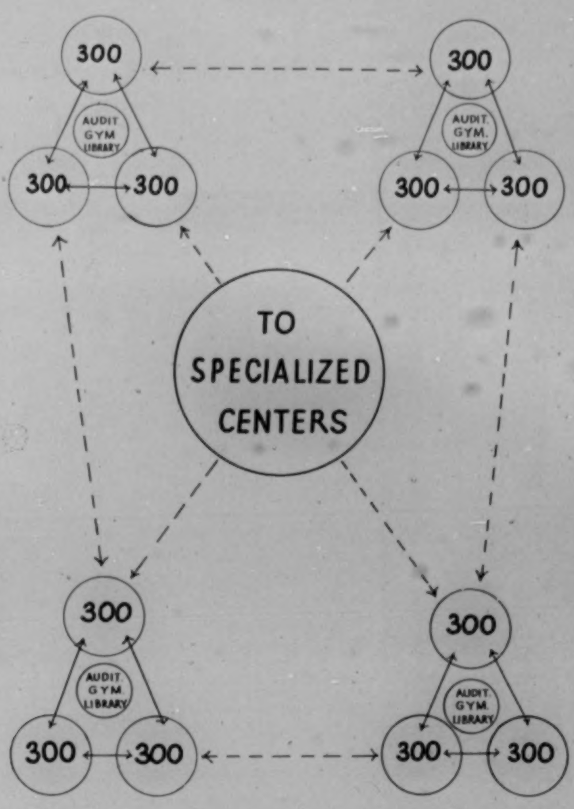
Here a unit of 300 would permit a staff to plan and work together and to incorporate specialization of teaching roles by subject matter at the higher grade levels. Each such unit could also contain some specialized equipment or spaces such as science and language labs, shop, home economics, library and eating facilities, etc. There would be guidance and supervisory staff and a unit "head" to coordinate the program.

If these 300-pupil units were then clustered by groups of three we would have four such groupings in the Park.

300 x 3 = 900 (a "school")
900 x 4 = 3,600

Schematically this is shown in Figure IV.

FIGURE IV



Alternatively we could have units of 400, place them together in 2's or 3's and have the following:

a) 400 x 2 = 800
800 x 3 = 2,400
(400 x 3) x 1 = 1,200

3,600

b) 400 x 3 = 1,200
1,200 x 3 = 3,600

If alternate "a" works out in terms of quantitative analysis of space and personnel, it is a preferred pattern in terms of constraints on size of the schools.

The High School

For the senior high school, we should again expand the basic unit to encompass a still larger range of specialization of staff, equipment and space, while at the same time keeping the size of the unit small enough to permit most of the staff of a unit to know each pupil or at least a very large majority of them, and to continue the feeling on the part of the pupil that some few know him well. We could have 400-pupil units (since this is thought to be a still manageable "span of knowing" by principals who have given some thought to the question and since it is currently in use in some house plan high schools with apparent satisfaction—again based more on expert opinion than on very careful analysis).

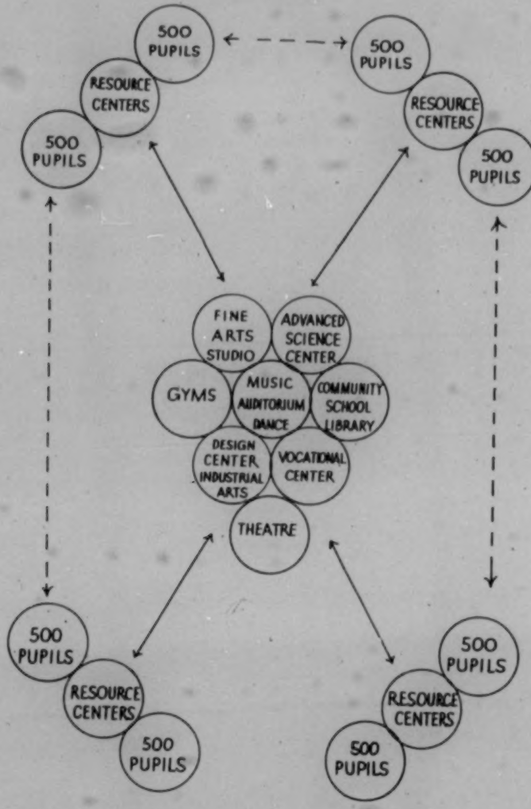
We would thus have:

400 × 3 = 1,200
1,200 × 3 = 3,600
400 × 2 = 800

4,400

If we wish to fit precisely to 4,000 we can move this last unit to one of the 1,200 clusters, making two @ 1,200 and one @ 1,600.

FIGURE V



Another pattern would be to use 500 as the basic unit and then either group two of these together for a "school," making four such 1,000-pupil schools, or grouping four together and producing two senior high school units.

The two alternatives at 500 would provide, on the one hand, four equal and competing (in the positive sense) schools, but would have more specialized staff, equipment and space outside the unit, while on the other, the two large schools could have more of the program self-contained.

There are advantages in each. In the former, the total school size of 1,000 makes it least like the traditional high school in image and organization, and can therefore be useful in developing new and perhaps more effective supervisory and administrative services and patterns. It might give the student more of an interest in and feeling for his "house" and the total park (i.e. in identifying with either 500 or 4,000). The smaller unit would also more readily justify special central facilities to avoid duplication.

It is at this point that several concerns converge: the need to concentrate specialized staff and equipment at the upper grade levels, the requirements for separation of spaces for community use of a variety of these same spaces, and the latitude and freedom of movement which should be made available to the older pupils. For a large part of the student body the aim should be to expand the amount of self-directed activity, independent study and responsible student roles. The school plant should respond to the students' increasing maturity.

If there is to be this centralization of specialized spaces, the smaller high school organizational model would seem to be preferred. It would serve as the home base for two groups of 500 pupils, have sub-library, eating and office spaces. Guidance counselors and instructional "heads" would be located here, but except for general classrooms for English, history and perhaps mathematics, instruction would for the most part be concentrated in the specialized areas.

The relationship of the units, (paralleling the patterns of the middle school) diagramatically is shown in Figure V.

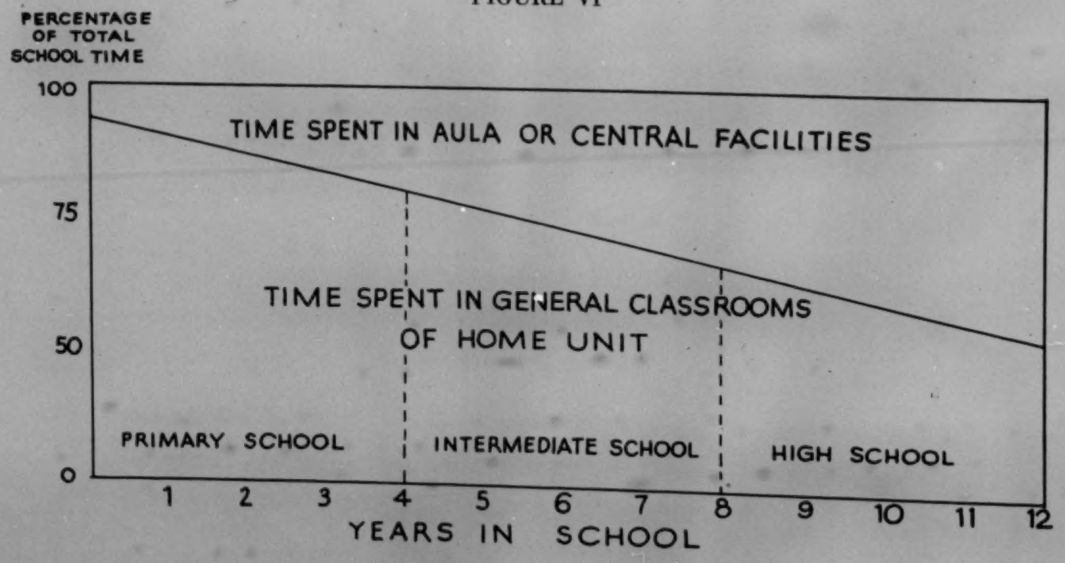
The total plan of organization would provide a regular progression of pupil movement with the grade level attained, or better, with the intellectual attainment and social maturity of the student.

In planning space for the school units and in determining the relationships between school units and central facilities this progression would represent a distribution which may be diagrammed as in Figure VI.

The Park would then consist of four elementary schools, each composed of three 150-pupil units, four intermediate schools each containing three 300-pupil groups, and four high schools each with two 500-pupil elements. Travel would for the most part be internal within the unit and school. The amount of exterior movement would increase with grade level and become for many maximum in the senior year. But even here block scheduling would make it possible to keep this traffic within bounds, thus avoiding the necessity of having student traffic "control" the basic design solution—although it would of course be a consideration in any plan.

An organizational approach such as proposed can serve as a conceptual model for the process of planning the utilization and design of the total site. It may also provide a framework for innovation and improvement in the instructional program and process, thus adding to the stature of the entire Park effort.

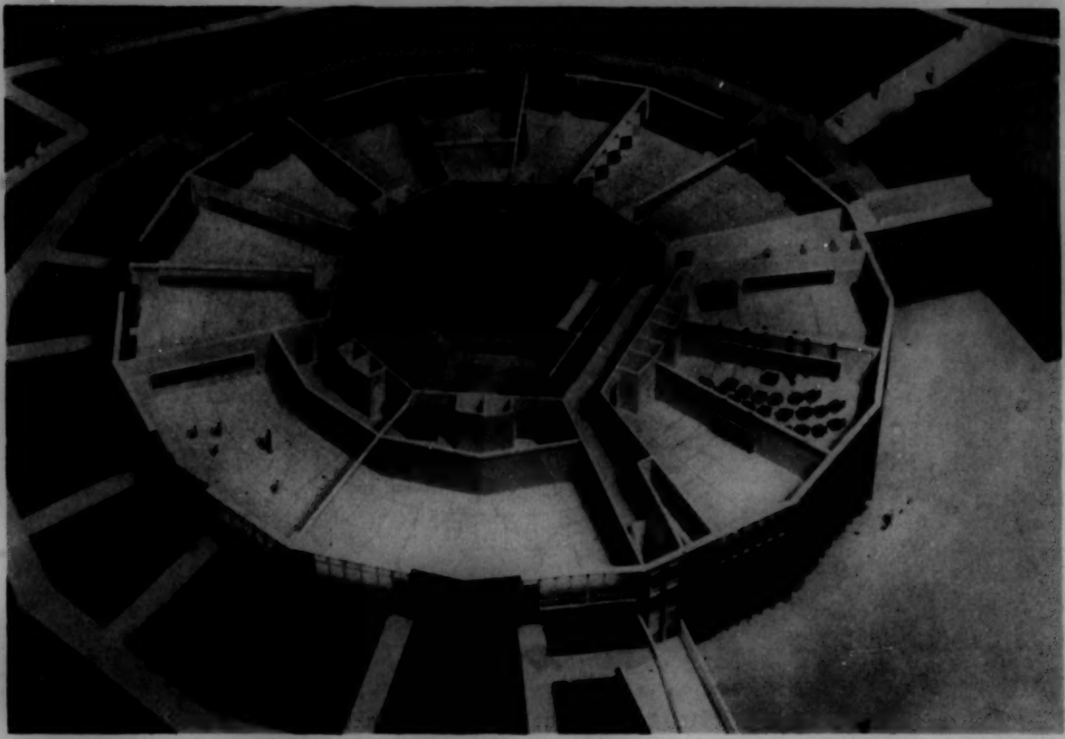
FIGURE VI



APPENDIX II

PLANNING CLASSROOMS AND AUXILIARY SPACES

By CYRIL G. SARGENT



One of the purposes of grouping of pupils by units of 150, 300 or 500 is to make possible a certain personal knowledge about each student which, hopefully, can help motivate and better guide his intellectual efforts. At the same time, it can make available a wide range of opportunities for engaging in extracurricular activities and leadership roles. It also seeks to bring services to the pupil rather than having him go in search of them.

The unit consists of the pupils, a core group of teachers, supervisors, guidance personnel and library staff assistants. Together they make up the "constant" members of the unit. The classrooms, offices and supplementary spaces make up the physical "house." the pupils leave this home base for "specialized" instruction—i.e. instruction which requires more highly specialized personnel than the core staff, more elaborate space and equipment, or for which there is not a large enough enrollment in the home unit to justify offering the work.

Just who these teachers are, and what the spaces should be, depends on how extensive the decentralization of personnel and space is to be. It also depends on the grade level and size of the unit grouping.

For illustrative purposes assume a unit at the senior high school level. This group is heterogeneously selected and stays together throughout the four high school years. They go their several academic and vocational program ways, but they have some common program elements, extra-curricular and social activities, and they organize internally for a variety of intramural purposes—sports, drama, music, student council, etc. Instruction in English, mathematics, social studies and languages is generally given in the center, while vocational work, science, art, music and advanced work in most fields is offered in those areas of the complex designed especially for these functions.

A second feature of this decentralization plan is to break up some of the large central facilities of the traditional school and make these available to the students and faculty of the units. The most important feature of the unit plan is the resultant *resource center*, commons area or sub-library, as it is variously called. Whatever its name, its purpose is to provide carrel space and listening booths for individual study, and make available reference books and study space. Sometimes offices for administrative or guidance personnel, or for teachers, are added to this and it is also made to serve as an after-school meeting place.

The space for such a resource center comes from a reduction of the central library area, elimination of study halls and from a decentralization of the cafeteria. Some designs are such that these center areas also serve as "walk-thru" space and thus make use of what otherwise might be only corridors. (This latter use is of course subject to safety-code restrictions.)

The key question in developing resource areas without significantly increasing the total square foot requirements for the school as a whole is that of determining where this space can be "taken from."

Library and cafeteria are the main sources. The usual school library seats anywhere from 10%-15% of the student body. With the house plan, this percentage is readily reduced to 2%-5%. The cafeteria requirements are met in the house by using the resource area and opening up two or more classrooms on to the central area. Food is shipped in from a central kitchen. All trays and eating utensils are made of disposable materials which are removed at the end of the lunch period. This method of feeding has the added advantage of breaking up the mass feeding process with its attendant problems of din, digestion and discipline.

How this can work may be illustrated by taking a unit of 500 pupils. If we assume that, on the average, 4/7 of the students' instructional time will be "in house" and we can use an 85%

utilization rate with a class size of 32, then 11 (10.5) classrooms will be required for the house unit. During the eating time, 167 pupils will be fed in each of the three sessions. Of these, 95 would otherwise be in "in house" classrooms. Since they are eating this will release three classrooms. If we use these classrooms for eating then we are left with 71 pupils to be seated in the resource center itself. Diagramatically, the house unit might consist of 11 classrooms, six of which might be clustered around the resource center, with three opening up directly on to the center for the lunch periods (Figure I).

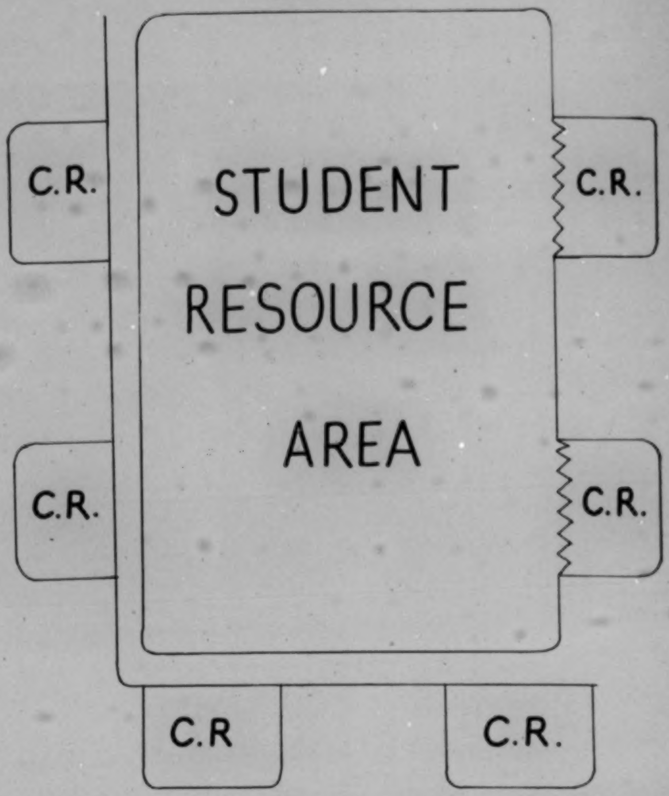
Pursuing this particular pattern further we would need to provide in addition to the pupils' resource center a faculty office center, conference areas and instructional media sub-center. (The main IMC would be centrally located.) For illustrative purposes, we might then need space for offices for 16 teachers, guidance personnel, administrative and clerical staff. There would be referance materials and work space for small teacher-planning conferences. The teachers would use this area for their lunchroom.

It might be centrally located as in Figure I, but would not need to have adjacent classrooms open up onto it. It might be completely surrounded by corridor space. Architecturally, we would then have a two-story house unit. On the first floor there would be five or six classrooms with the student resource center. Directly above would be six or five classrooms with the staff resource center.

What seems evident, and this is borne out by experience, is that the double-load corridor-type of school plan cannot satisfy these requirements at all effectively. New shapes and forms are required. Imagination in design is essential.

Figure I is an example of a possible classroom clustering with a center resource area. While it does not precisely fit the program outlined in this memorandum, it is illustrative of the type of design solution consistent with the sub-unit approach.

FIGURE I



APPENDIX III

THE COMMUNITY SCHOOL AND THE PARK

By CYRIL G. SARGENT

The traditional public school has sparse links with its community. Yet there are examples of schools which reach out into the community and develop effective roles and relationships. It is rather obvious to suggest that a good school is difficult to achieve without a good community. The Education Park would seem to provide an opportunity to test on a more significant scale the possibility of expanding this relationship and of formulating a wide range of effective activities which can both nurture the community, and by which the school and its efforts can themselves be nurtured.

The mere aggregation of 50,000 to 55,000 people may make up Co-op City, but it takes a common purpose and substantial cooperative efforts to make a community. Without some community of purpose, the project may be merely an aggregate and a collision of people and buildings. In contrast, the culture of a genuine community can transmit a wealth of civilization, enjoyment, even health, to each of its participating members.

The term community of course is not limited to the geographical boundaries of the development, the borough or even the city, yet the development is the point of daily face-to-face interaction. It can therefore be the focus of a set of satisfying and creative relationships with fellow members of the community. And the schools may well serve as the "seed" crystals around which these neighborhood or community relationships develop.

What a community program is and what its implications are for the planning and designing of the school park is complicated by the fact that the term is often used to refer to any of three somewhat different programs. For the Park it could mean a high development of all three.

Without elaborations here the three types of programs might be summarized as follows:

1. *A highly developed use of community resources for carrying forward the basic educational program.*

The variety of purposes and relationships may be involved in such a development include: drawing on trained personnel from industry, business, research and other fields for part-time teaching; combined work-study programs in business, industrial, governmental, health or civic programs for secondary school pupils; use of parks, marshland or river for "nature study" even by pupils in the elementary grades, and in later years for study of biology and public health; making the community and its social and political life a prime source of study in civics, economics and other social studies; joint programs of cultural enrichment, involving museums, libraries, historical societies and the community's resources in painting, sculpture, music, drama and literature. This development both implies a relationship with the immediate geographical vicinity and with the city and region. It suggests the development of facilities particularly in the arts and sciences on the school site itself.

2. *A substantial use of the Park as a neighborhood and community center.*

A program of this sort implies that the people of the Co-op development would make use of the school facilities to carry on activities in which they are interested, largely under leaderships of their own choosing. This is different from the conduct of some more limited types of programs conducted by the school department, although these can be a subordinate aspect of this type of community school program.

The program may include:

Athletic and physical fitness activities.

Recreational programs of all kinds and for all ages—from hobby clubs to dancing, and from "little theatres" to painting, sculpture and "the arts" in general.

Meetings and suppers of the "neighborhood" associations, youth groups, mothers clubs, senior citizens, and meetings of the Co-op organization itself.

Programs for neighborhood and civic improvement.

Programs of adult education of some of the more familiar kinds as determined by the interest of the local population: vocal and professional improvement, foreign language study, science, arts and crafts, special courses and programs conducted for memberships of business and trade associations.

After-hours or "extended school day" programs for the school pupils themselves. (The "lighted school house" program in Chicago and the "community school" program in Flint, Mich., and New Haven, Conn., are illustrative of the development of programs of this type.)

3. *The use of the schools as a major community service agency.* This aspect of the community school program as distinguished from the use of school buildings as centers of neighborhood interests and programs, refers to the conduct of *planned city-wide efforts and programs.* These may be in such fields as health, preventive medicine, mental health, safety, law enforcement, social service and economic development. These programs are in general dictated by the public need. They often require direction and service by the trained personnel in specialized agencies. But the fact that they depend, for their effectiveness, on widespread information and cooperation, requires adequate community organization and facilities.

In relating these three types of programs to the Education Park it seems clear that one can foresee a full twelve months operation of the schools' facilities, and that the school day might well run from 8:00 a.m. to 10:30 p.m. The regular single session staff of teachers and administrators might give way to two or more such staffs, who may in fact overlap in their time on the site and therefore in their need for office space and planning areas.

One can picture the school as an active and exciting place at all times, and in the afternoon and evening programs the Jane Jacobs image of an "interweaving of human patterns" perhaps sets the requirements for some of the architectural needs which will have to be met. The library, gymnasium, swimming pool, theatre, art studios, shops, meeting rooms, music halls, all are in use. People are moving freely about among these areas which are connected perhaps by an immense pedestrian plaza, brightly lighted and safe. They have arrived by pathways from their houses, or by auto, driving in under the plaza and parking underground in spaces used by the day school staff.

The additional space requirements for this community school program are modest. Most of the requirements are met by the regular school facilities. But the library will be larger and serve as the public library of the area. It will also include offices and conference rooms, and perhaps some special meeting rooms with small kitchens available so that small group suppers or repasts can be prepared. And of course some groups (retired or housewives) will want to be able to meet during the regular school day.

Gyms, pools, theatres, music auditorium, art studio, shops and other areas will need substantially increased—and separate—storage areas for what will amount to a two-platoon use of these facilities.

It is here perhaps that the economy of scale enters into the Park complex, providing both variety and quantity to make a community school program effective, unfettered by limitations of space.

The community school emphasis would seem to suggest a design approach that would set physically apart those facilities more frequently and naturally used by the adults and youth during afternoons and evenings. Not only does this permit of some zoning of the units for control purposes (and to reduce heating costs), but it creates a campus-like atmosphere which can be useful in the regular day school. The campus provides a kind of "change of pace" condition which many independent schools find very conducive to a release of tensions and an easing of discipline (although this is probably somewhat in the line of a self-fulfilling prophecy).

This approach to community school needs has implications for the organization and physical layout of the regular school facilities and suggests the advisability of considering a separation of some of the specialized areas from the general classroom spaces, particularly on the senior high school level, but possibility also somewhat for the intermediate school.

Up to this point there has been no attempt to specify numbers of spaces, areas required and needed equipment. These quantified data can be specified and will follow after the general conceptual approach is decided upon and some more specific assumptions made as to program needs of the regular day school students.

(Just as a note in passing although not necessarily a part of the community school emphasis, consideration should be given to exploring the use of the Park for civil defense shelter purposes. Federal funds may make it possible to provide some substantial areas which may permit of other than emergency shelter use.)

APPENDIX IV

THE ARTS — FINE AND APPLIED

By CYRIL G. SARGENT

There are a number of issues to be resolved in planning for the Arts. These center around centralization *vs.* decentralization, the relationship between the fine and applied art fields, community use of facilities and, of course, probable future trends in student enrollment among the different fields of activity.

From the point of view of physical planning, the issue of centralization of art facilities *vs.* their decentralization is rather key. It is one on which professional opinion, particularly at the college and community college level, is divided. Those favoring centralization argue that by centralizing art facilities, one gives expression to the essential unity of all art forms and brings into close physical proximity those whose work in each of the special fields should be related. They argue further that centralization makes possible the design and construction of strong physical elements which of themselves can be both an important art form and serve as a representation of the unity which they feel is so essential.

They further point out that where there is to be any extensive use of these facilities by the community for concerts, dramas, the dance and for exhibitions, there is a need to group these areas together for convenience, control and economy of maintenance—particularly of heating. One further point is sometimes made to the effect that centralization makes it possible to achieve an economy through the multiple use of auditoriums, theatres and concert halls.

The position of the "decentralists" takes the form of objecting to centralization as setting apart and isolating activities which should be an integral part of the everyday experience of all pupils. By separating the art facilities they feel that those who both teach and study or specialize in these fields will be isolated, viewed as "soulful actors and sandaled painters who talk to each other but not to the mere mortals of other departments." Thus, they believe that it is urgent for those majoring in math, science and the vocational fields to be given a casual, undirected contact on a day-to-day basis with art activities.

As to the community use of facilities, they take the position that while one or two performance halls may well be centralized, the day-by-day work of students is irrelevant to the adults of the community and, therefore, need not be in a centralized complex but rather dispersed throughout the school complex.

The economy argument and the low utilization problem they answer by pointing out that in a large campus or school complex the utilization of each of the major components can be sharply increased. Moreover, they remind those favoring centralization for economy that the multiple-use hall has rarely, if ever, been successfully developed and that this represents a totally unsatisfactory compromise with the standards of quality which each of the art forms has a right to demand of the space in which it is to be presented. So there is no easy answer.

Very probably, both positions are valid within limits and in the case of a complex of 10,000 students with a wide age span the solution probably lies in going both ways but with different emphasis at different grade levels. In the earlier grades, the art program is not an entity as such but an element in the total general program of each pupil. Thus, there is no differentiated art space. At the middle school level there can be some specialized space—for both fine and applied arts and at this level it might be very well possible to explore a blending of these two usually separated fields. These spaces would still, in general, meet the criterion of decentralization; and such performance spaces as might be needed could also be decentralized and of multiple use.

At the senior high school level, the arguments for centralization can be pressed both in terms of specialization of pupil interest and program requirements, and in terms of quality of performance spaces. Community use of these facilities would also argue for centralization, for these more elaborate spaces with sophisticated equipment are the ones most suitable for adult community use.

The Specialized Spaces

Because of the size of the Education Park, it becomes feasible to provide several spaces for the performing arts which will be of high quality and which, because they are specially designed, will avoid the dilemma of the usual high school auditorium with its attendant problems of scheduling conflicts, particularly when two different types of performing groups compete for the same space, both during the regular school day program as well as during after-school adult use.

There appears to be a general agreement among experts that multiple-use space for the performing arts represents a compromise for each field. It is not, therefore, a satisfactory solution for any. Acoustics and stage requirements for a musical performance (instrumental) suggest a long, rectangular, box-type structure similar to Boston's Symphony Hall. The theatre requires that the audience be near the stage, that all sight lines be excellent and that the acoustical properties be appropriate for picking up the human voice from a wide range of stage positions.

While the concert hall may, therefore, justifiably accommodate a relatively large audience, the preferred size of a theatre appears to be 500 or less. There are further issues to be resolved in connection with the theatre. Opinion currently seems to be rather sharply divided between the traditional Proscenium arch-type of stage arrangement with its realistic stage setting as against the open stage extending at least half of its depth directly into the audience area and relying on the simplest of stage properties to suggest the setting.

In addition to the theatre and music hall spaces for the performing arts, there are quite different requirements for the visual arts—painting, design and sculpture. These require studio type facilities with either separate spaces for each specialized activity or a large loft-type arrangement which can be broken up into smaller "centers of interest" to accommodate a variety of special activities, and which can be varied as to relative sizes in accordance with student enrollments.

Recommendations

Much of the point of view which seems appropriate for the Park developed during our discussions with Mr. Dober. Briefly, it seemed to be agreed that the issue of centralization *vs.* decentralization could be resolved by going both ways. No special art spaces in the primary school; some few design oriented spaces in the intermediate school, with multiple-use small auditorium facilities; and at the high school level, centralized and specialized areas for each of the major art fields would seem to represent a reasonable progression.

APPENDIX V

INSTRUCTIONAL MATERIALS CENTER

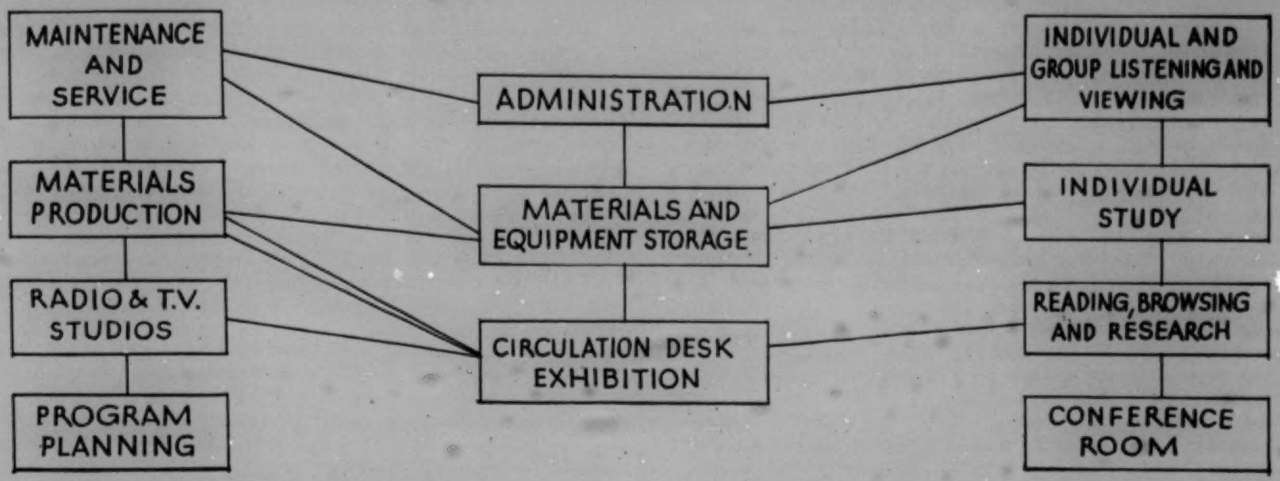
By LOUIS A. ROSASCO

The marriage of book companies and electrical and appliance companies has resulted in an increase of educational hardware. What was once the province of traditional text book publishers now has been invaded by the makers of the new media. This new abundance of materials and supplies for school use has created the need for management and storage. Schools must provide for intelligent selection, purchase, distribution, training in use of media, maintenance and storage. The answer to these problems is more and more the instructional materials center.

The instructional materials center in an educational park should be planned to encourage and facilitate reasonable learning activities related to materials and media. These learning activities may suggest separate but coordinated areas of learning for students and for professional personnel.

An instructional materials center should be examined from several points of view. In terms of the functions of a center first—ordering, cataloging, producing, inventory, storing, maintaining, creating, experimenting, previewing, evaluating, testing, distributing, broadcasting, programming, guiding, teaching, writing; in terms of the materials that describe a center—books, periodicals, pictures, models, mobiles, programmed materials, slides, film, microfilm, tapes, overlays, records, maps, charts, graphs, screens, radios, TV receivers, TV projectors, recorders, teaching machines.

The center should be arranged so as to isolate noise-producing areas from classroom and reading areas. Space for storage should be flexible and adequate for future needs. One plan for space relationships is given on the next page.


MAINTENANCE AND SERVICE
MATERIALS PRODUCTION
RADIO & T.V. STUDIOS
PROGRAM PLANNING
ADMINISTRATION
MATERIALS AND EQUIPMENT STORAGE
CIRCULATION DESK EXHIBITION
INDIVIDUAL AND GROUP LISTENING AND VIEWING
INDIVIDUAL STUDY
READING, BROWSING AND RESEARCH
CONFERENCE ROOM

If the instructional materials center incorporates the usual library functions, reading and study areas should be provided for group use of library and reference material. Other areas which are more closely a part of the center are briefly described.

Individual study spaces should be equipped with outlets for using listening devices, teaching machines and individual teaching units should have desk area and book storage; in some cases should have individual reading chairs, and should be well-ventilated, with noise resistant floors and walls, and proper lighting.

Individual and group listening stations should be soundproofed, well ventilated; open enough for proper supervision, and should be equipped with outlets, shelves and storage areas for machines, tape recorder, record player and earphones.

Small group conference areas should be well lighted, ventilated and soundproofed; should have space for conference table and chairs; should be fitted with all devices of a listening station, and should be large enough to be subdivided into two smaller areas.

Film preview space should be arranged for small group use—tables for notes, etc., and should be soundproofed and well ventilated.

Microfilm reader space should have microfilm readers and furniture, and should be soundproofed and ventilated.

Circulation areas should be the hub of the instructional materials center; should have space for card catalog, inventory and circulation files for all media, and should have proper space and equipment to store materials prior to transit and after receipt, carts for equipment movement, transparency and slide drawers, picture and poster slots, record cubicles, tape shelves, model shelves, film racks, film strip wall files, storage units for larger equipment like TV, etc.

Materials and equipment storage area should provide for storage (adjustable) for such equipment as projectors, recorders, equipment carts, racks for maps and graphs, space for models, exhibits, globes and all other media.

Materials production area should provide for the reproduction of printed materials and construction of all types of teaching materials; should include facilities for producing for a TV studio; should provide a dark room, dry mounting press, duplication copy equipment, transparency material, small tools, sinks, multilith and mimeograph facilities, and should provide space for film and tape work areas, etc.

Office area should provide space for a general supervisor, material and production specialists, and for general curriculum specialists (K-12).

Maintenance and service area should house facilities for work benches, parts storage, storage for equipment to be repaired, tools, etc.

Faculty professional library should provide space for storage and display of materials, and areas for reading and browsing.

TV areas should have facilities for film broadcast, with a TV studio control room, and TV broadcast teaching studio.

Audio-learning laboratory room should be equipped with a language laboratory and should be flexible so as to provide an opportunity to experiment with plans geared to develop the function of the learning laboratory beyond the usual language classes.

* * *

This paper is designed to provide general directions for an instructional materials center. The educational park concept makes it possible to concentrate all the facilities described in a tower of learning which is accessible to all units. It is understood that each school sub-unit will need to provide some space for storage and utilization of materials.

APPENDIX VI

HEALTH EDUCATION

By LOUIS A. ROSASCO

Certain basic concepts about programs of health education have been developed in recent publications of research on the needs of children in this field.

In the interest of providing criteria for facilities, I repeat material developed while creating a curriculum guide for Health Education.*

In the kindergarten and primary grades (K-3) best results may be attained by giving emphasis to health *practices* during the early years of school life. Health attitudes will develop as by-products. Much of the knowledge that the young child acquires may be incidental to the practices and will not be extensive. Health knowledge at this stage is not the *primary factor*.

In the intermediate grades (4, 5 and 6) particularly with 10-and-11-year-olds, the order of emphasis in terms of readiness is *attitudes*, practices and knowledge. Children at these ages are highly impressionable and attitudes are readily acquired.

It is important that desirable health attitudes be acquired and that children not be denied the opportunity to develop health attitudes. Practices already formed should be further established and reinforced. Knowledge to sustain the attitudes and support the practice will be necessary. Specific areas of study may be organized around the needs and problems of pupils.

---

* *Curriculum Guide for Health & Safety*, E. Farley, L. Rosasco, J. George.

In the junior high school (7, 8 and 9) the relative emphasis is upon *attitudes*, knowledge and practices. By this time health practices should be well established. The idealism and altruism of this age lend themselves to the acceptance of recognized ideals of health and the development of additional attitudes toward health.

In the senior high school (10, 11 and 12) the health practices and attitudes which have been formed previously should be reinforced as rapidly as possible by accurate scientific *knowledge*. At this stage, to know not only the what, but also the how and why, is important. Conviction that his health attitudes, ideals and practices are sound scientifically will cement the health education a student has acquired, and assure him of adequate preparation to make the necessary health decisions.

We believe that in the elementary school, the major responsibility for learning in all areas of the curriculum rests with the classroom teacher. But there is a host of resource people to call upon—the health teacher, school nurse-teacher, science supervisor, physical education teacher, school psychologist or guidance counselor, custodian—all of whom may make special contributions to the education program in health and safety. Perhaps every teacher is a teacher of health, but experience has taught us that unless each elementary teacher uses a planned, sequential health instruction guide, this area of the curriculum tends to be neglected, even forgotten. The incidental learning, the "teachable moments," must continue to be utilized, but they are not enough. The areas of study which emphasize the development of health practices, skills and attitudes should be part of the planned regular instruction program within each classroom.

In the junior high school, although some areas of the curriculum may contribute particularly to the knowledge pupils may acquire in health and safety, such offerings are not enough. Every boy and girl should be given the opportunity to explore, experiment, question and, finally, formulate for himself lasting attitudes in health and safety education.

In the junior high school, we believe that a concentrated course in health should be required for *all* pupils. Ideally, this course should be given to boys and girls together, five days a week during one of the three years. It should be taught by a qualified health teacher. Practice indicates that alternate plans may be considered, i.e. two days a week for the first semester and three days a week for the second semester alternating with science or physical education over a period of two years; or a block of ten weeks daily at least twice during the three-year period. It is important to note that we believe a classroom should be provided for health education classes, not the gymnasium oı the auditorium.

The chief administrative officer must take the responsibility for planning a sequential program in health education as in all other areas of the curriculum. It also is his responsibility to see that qualified teachers are recruited to ensure the kind of learning which is called for in this type of planning.

In the senior high school, we believe that a separate course in health taught coeducationally meeting five days a week preferably for a full year, but at least for a minimum of one semester, should be required for every boy and girl. This course should be taught by a qualified and fully certified health teacher, and offered preferably during either the eleventh or twelfth year.

Again, in order to ensure that a well-planned, sequential health curriculum is developed, we believe that the chief administrative officer and the high school principal must take the responsibility for planning a program with the health education teachers and the teachers in related areas of the curriculum. Again, as in the junior high school, it also is the responsibility of the chief administrative officer to see that qualified and certified health teachers are recruited to ensure the kind of learning which is called for in such planning. It is essential that the knowledge and information included in the sciences, social studies, home-making and industrial arts supplement the health course, not duplicate it. Results can be assured only when a very real effort is made to coordinate this area of the curriculum.

Acceptance of these principles will mean the assignment of special health teaching rooms at the junior high and high school levels.

Society of Wisconsin

OF PLAQUEMINE, LA.,
1965

Box 37
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Please Retain Original Order

TELEPHONE
DI 8-3572

MURPHY W. BELL
ATTORNEY AT LAW
971 SOUTH 13TH STREET
BATON ROUGE, LA.

July 21, 1965

JUL 26 1965

Mr. Carl Rachlin
General Counsel, CORE
38 Park Row
New York 38, N. Y.

Dear Carl:

Make a copy of the enclosed petition and send the copy to Collins, Douglas & Elie.

Yours Truly,

Murphy

Murphy

MWB/ps

enclosure

EIGHTEENTH JUDICIAL DISTRICT COURT
IBERVILLE PARISH
STATE OF LOUISIANA

NATHAN GEORGETOWN, for himself and
as a member of the class of persons who
are residents of the unincorporated area of Iberville
Parish known as Dupont Annex

plaintiff

VS.

CHARLES SCHNEBELEN, Mayor of the Town
of Plaquemine, ARCHIE V. CALLAIS,
MICHAEL R. EBY, CARROLL FLATAU,
WARREN J. HERBERT, JR., D. J. MCDUFFIE,
members of the Plaquemine Board of Selectment

defendants

* *

PETITION FOR WRIT OF MANDAMUS

I.

Plaintiff Nathan Georgetown is a citizen of the State of Louisiana and a resident of the unincorporated area of Iberville Parish known as Dupont Annex, and brings this action on behalf of himself and others similarly situated as provided by the Louisiana Code of Civil Procedure, Title 2 Article 591 (1) in that it would be impracticable to bring all the members of the class before this Court, and that there is involved common questions of law and fact.

Defendants Charles Schnebelen, Archie V. Callais, Michael R. Eby, Carroll Flatau, Warren J. Herbert, Jr. and D. J. McDuffie and each of them are persons of lawful age and capacity and are domiciled in the Parish of Iberville, State of Louisiana.

This Court has jurisdiction under the Louisiana Constitution, Article VII, Section 35 to supervise the functions of the officials of the State of Louisiana and its political subdivisions. State ex rel. Dupas v. City of New Orleans, 102 So. 2d 77 (La. App. 1958), aff'd 240 La. 820, 125 So. 2d 375.

II.

Plaintiff alleges that during the week preceeding the 29th day of September, 1964, he and other residents of Dupont Annex caused to be filed with the Clerk of the Town of Plaquemine a petition signed by plaintiff and other residents of said Dupont Annex representing 33% of the residents of Dupont Annex and 1/3 of the assessed valuation thereof, requesting that an election be held in Dupont Annex pursuant to the terms of L.R.S. 13:157 to determine whether said Dupont Annex is to be annexed to and made part of the corporate structure of the Town of Plaquemine;

(1) That on the 29th day of September, 1964 the respondents duly resolved in their capacities as Mayor and Members of the Board of Selectmen of the Town of Plaquemine, to reject the petition hereinabove described, and that said resolution was unanimously approved;

(2) That a copy of the minutes of the meeting of the Board of Selectmen in which the above action took place, duly certified, is attached to and made part of this complaint;

(3) That the petition so presented and rejected was in all regards correct and of proper form under the laws of the State of Louisiana, and that a dulyc certified copy of same is attached to and made part of this complaint;

(4) That the defendants' refusal and rejection of the petition was without reason assigned;

(5) That on numerous previous occasions, requests have been made by residents of the territory of Dupont Annex that the section so named be annexed to and made part of the town of Plaquemine, and that on all such occasions the requests have been denied.

(6) That the defendants did willfully, intentionally and arbitrarily deny said applications for the sole purpose of excluding the Negro voters of Dupont Annex from voting in Municipal elections for the purpose of diluting and minimizing the effect of the votes of Negro citizens residing in the incorporated Town of Plaquemine;

(7) That the defendants, by the acts hereinabove alleged were acting pursuant to an open and notorious plan and program established over the years for the purpose alleged above, and further to perpetuate and indurate segregation of the races in civic and community affairs, and in other places and activities.

(8) That Dupont Annex is a Negro "ghetto" created by the process of "selective annexation" practiced by the defendant members of the Board of Selectmen and their predecessors and defendant Mayor and his predecessors, and that the only reason for the refusal to grant the petition presented as alleged hereinabove was to maintain the section called Dupont Annex outside of the corporate limits of the Town of Plaquemine in order to perpetuate the control of the government in the hands of members of the Caucasian race contrary to the spirit and letter of the Constitution and laws of the United States.

III.

Under the terms of L.R.S. 33:151-161 in general, and 33:157 in particular, the defendants are without discretion to refuse a request, properly drawn and containing all the essential elements required by law, praying that an election be held in the territory to be annexed, and that if a majority of the residents of said territory are in favor of its being annexed to the Town of Plaquemine, that an election be held in the Town of Plaquemine itself to determine whether a majority of the people residing therein would be in favor of said annexation.

WHEREFORE, plaintiff prays:

~~Members of the Board of Selectmen of the Town of Plaquemine ordering them to perform their duty under the terms of the law~~

(1) For service and citation as the law directs; upon the Mayor and the Members of the Board of Selectmen of the town of Plaquemine , Louisiana.

(2) That a Writ of Mandate issue directing the Mayor and the Members of the Board of Selectmen of the town of Plaquemine

order and decree that an election be held in the territory of Dupont Annex to determine whether a majority of the person therein residing be in favor of annexing said territory to the corporate structure of the town of Plaquemine, and that upon such vote, and election be held in the town of Plaquemine proper to determine whether a majority of the persons therein residing be in favor of said annexation.

(3) For such further an additional relief as the Court may see fit to grant in the interest of law and equity.

By Atterney:

Murphy W. Bell
971 South 13th Street
Baton Rouge, Louisiana

Signed: ______________________________
MURPHY W. BELL

ROBERT COLLINS

NILS DOUGLAS

LOLIS ELIE

2211 DRYADES STREET
NEW ORLEANS, LOUISIANA

Of Counsel

CARL RACHLIN

38 PARK ROW

NEW YORK 38, N. Y.

NATHAN GEORGETOWN, ET AL — 18TH JUDICIAL DISTRICT COURT

VS. — PARISH OF IBERVILLE

CHARLES SCHNEBELEN, MAYOR OF THE
TOWN OF PLAQUEMINE, ET AL — STATE OF LOUISIANA

NO. 11,044

* * * * * *

PEREMPTORY EXCEPTION OF NO CAUSE OR RIGHT OF ACTION

NOW INTO COURT, through their undersigned counsel, come Charles Schnebelen, Archie V. Callais, Michael R. Eby, Carroll Flatau, Warren J. Hebert, Jr. and D. J. McDuffie, defendants herein, appearing herein solely for the purpose of this exception and except to the plaintiff's petition herein on the following grounds:

That said petition discloses no right or cause of action for the following reasons:

a) Under Louisiana Revised Statutes 33:151 through 161, which provide for extension of corporate limits of a municipality by means of a petition and election, petitioner, by his very allegations, has failed to comply with said statutes in that no proces verbal and plat of survey of the land desired to be annexed to and included in the territorial corporate limits of the City of Plaquemine, have been attached to the petition.

b) Under Louisiana Revised Statute 33:153, which is one of the sections concerning such territorial changes in the municipality, if the petition mentioned herein had been properly presented, the municipal authorities may then order an election to be held by the qualified electors residing in and upon the lots to be annexed. (underscoring ours) The word "may" in the statute clearly leaves it within the discretion of the Governing Authority to order an election to be held for said purpose, and therefore, conceding that all the allegations of plaintiff's petition are true and correct, no suit can be maintained herein because the Governing Authority of the City of Plaquemine cannot be forced, under the very language of the statutes, to increase its corporate limits.

c) Under Louisiana Code of Civil Procedure, Article 3863, a writ of mandamus directed against a public officer can only be obtained when the performance of a ministerial duty required by law is involved and never when said performance is discretionary. Plaintiff seeks mandamus here in his petition whereas the language of the very statutes he cites leaves the extension of corporate limits to the discretion of the Governing Authority.

WHEREFORE, exceptors pray:

1. That these exceptions be maintained and that accordingly, there be judgment herein in favor of the defendants, Charles Schnebelen, Archie V. Callais, Michael R. Eby, Carroll Flatau, Warren J. Hebert, Jr. and D. J. McDuffie, and against plaintiff, Nathan Georgetown and all others whom he alleges to represent, rejecting the plaintiff's demand at his cost.

CHARLES SCHNEBELEN, ARCHIE V.
CALLAIS, MICHAEL R. EBY, CARROLL
FLATAU, WARREN J. HEBERT, JR. AND
D. J. MCDUFFIE, DEFENDANTS

BY: Edward N. Engolio
EDWARD N. ENGOLIO, ATTORNEY
514 Railroad Avenue
Plaquemine, Louisiana

****

CERTIFICATE

I certify that copies of the foregoing exceptions have been served on the opposing parties herein by placing copies thereof in the U. S. Mail, postage prepaid, addressed to his attorneys of record, Murphy W. Bell, esq. 971 South 13th Street, Baton Rouge, Louisiana, and to Robert Collins, Nils Douglas, Lolis Elie, 2211 Dryades Street, New Orleans, Louisiana, and to Carl Rachlin, Attorney at Law, 38 Park Row, New York 38, New York, on the 26th day of August, 1965.

Edward N. Engolio
EDWARD N. ENGOLIO

SEDFRE Gilligan, Thomas R. vs Farmer, James; C.O.R.E.; et al. July, 1964- March, 1968 Box 37 Folder 2
Correspondence

State Historical Society of Wisconsin

Please Retain Original Order

July 22, 1964

Lieutenant Thomas R. Gilligan,
c/o Alexander Herman, Esq.,
District Attorney's Office,
New York County,
155 Leonard Street,
New York, N.Y.

Dear Lieutenant Gilligan:

Mr. Herman has kindly agreed to forward to you this letter.

As you are aware, CORE is conducting an investigation of the shooting of James Powell. We would want that investigation to be as complete, fair and objective as possible. We have spoken to many witnesses. We would very much like to speak to you.

We would be glad to speak to you in a place selected by you and in the presence of anyone you wish.

You will understand that it is virtually impossible for us to secure a complete picture without your own statement.

In the interest of the community as a whole and your own interest, I urge you to cooperate with us, by speaking to us.

Very truly yours,

George Schiffer

COPY

U. F. 49

POLICE DEPARTMENT
CITY OF NEW YORK
NEW YORK, N. Y., 10013

FOURTH DIVISION
153 East 67th Street
New York 21, N.Y.

July 23, 1964

Mr. George Schiffer
Attorney at Law
40 East 49 Street
New York, N.Y.

Sir:

This is to confirm the scheduled hearing relating to the investigation of the complaint made by you regarding the shooting of James Powell on July 16, 1964 by Lieutenant Thomas Gilligan of the New York City Police Department.

As agreed upon in our telephone conversation of 3.00 p.m., July 23, 1964, this meeting will be held at the Office of the Fourth Division, located on the second floor of the 19th Precinct Station House, 153 East 67 Street, at 10.00 a.m., Wednesday, July 29, 1964. It is understood that you will appear here at this time with the witnesses you mentioned in your original complaint dated July 16, 1964.

If for any reason it becomes impossible for you or your witnesses to appear at this time, please call this office, UN 1-1200, for another date.

Thank you,

John Wynne

JOHN WYNNE
Deputy Chief Inspector

JW/gh

new file Powell Gilligan

JUL 27 1964

COPY

LAW OFFICES
SCHIFFER & COHEN

BARRY LEE COHEN
GEORGE SCHIFFER

40 EAST 49TH STREET
NEW YORK 17, N.Y.
PLAZA 2-8060

July 24, 1964

Mr. John Wynne,
Deputy Chief Inspector,
Police Department
City of New York,
Fourth Division,
153 East, 67th Street,
New York 21, N.Y.

Dear Chief Wynne:

As indicated to you on the telephone that I would, I consulted with Mr. Herman concerning the desirability and propriety of making witnesses available to your inquiry, prior to the appearance of these witnesses at the grand jury.

Mr. Herman and I are both of the opinion that it would be more proper to have witnesses appear first at the grand jury.

You may be assured of our cooperation to your investigation, subject to the foregoing.

Consequently, witnesses will not be made available on Wednesday July 29. As I further told you on the telephone, our witnesses will not be made available at any police department real estate. I am of the opinion that the witnesses are frightened of appearing in precincts, division offices, headquarters. Since it is far more difficult to secure the truth from a frightened witness than from a calm one, and since most of the witnesses are youngsters, I suggest that they be interviewed in their own homes or in my office, or in some other place where they will feel relatively at ease.

This is further to reiterate my request that the Civil Complaint Bureau and the Fourth Division cooperate

COPY

in our investigation by making available to us, under suitable safeguard and conditions fixed by you, witnesses known to you but not known to us. I recognize fully that these witnesses are not required to talk to us. I would be the first to respect their right to avoid us. If, however, we are to conduct a fair and full investigation, the police department should cooperate with us to the extent of suggesting to the witnesses that the police department has no objection to their talking to us, if the witness has no objection. Certainly, these witnesses have nothing to fear from us, We have resolutely refused to release the names of witnesses to the press during the pendency of the investigation. It goes without saying that we do not expect to speak to witnesses scheduled to go to the grand jury until after they have done so.

You should recognize that in the absence of a civil review board, the community will place some weight on our objective investigation. Such an investigation should be valuable, not detrimental, to the police department and should have its full cooperation.

Very truly yours,

George Schiffer

cc: Mr. James Farmer
Carl Rachlin, Esq.
Alexander Herman, Esq.
Leonard E. Reisman, Esq.
Deputy Inspector Savitt

Mr Gilligan
File

August 12, 1964

Miss Simone Montgomery
162 West 123rd Street
New York 27, New York

Dear Miss Montgomery:

Thank you for your letter of recent date.

Have you had a reply as yet from either the Mayor or the Commissioner on your complaint? Also, what is the amount of your actual damage?

Please advise us on these points.

Sincerely,

Carl Rachlin
General Counsel

CR:rrl

September 3, 1964

The Honorable Hubert T. Delany,
55 Liberty St.,
New York, N.Y.

Dear Judge Delany:

I am enclosing herewith copy of the CORE report relating to the Gilligan case, as well as copies of the various interviews secured from witnesses of the incident.

With best wishes,

Sincerely,

George Schiffer

Encl.

COPY

HUBERT T. DELANY
COUNSELLOR AT LAW
WORTH 4-8711

55 LIBERTY ST.
NEW YORK 5, N. Y.

September 4th, 1964

George Schiffer, Esq.
40 East 49th Street
New York 17, New York

Re: JAMES POWELL

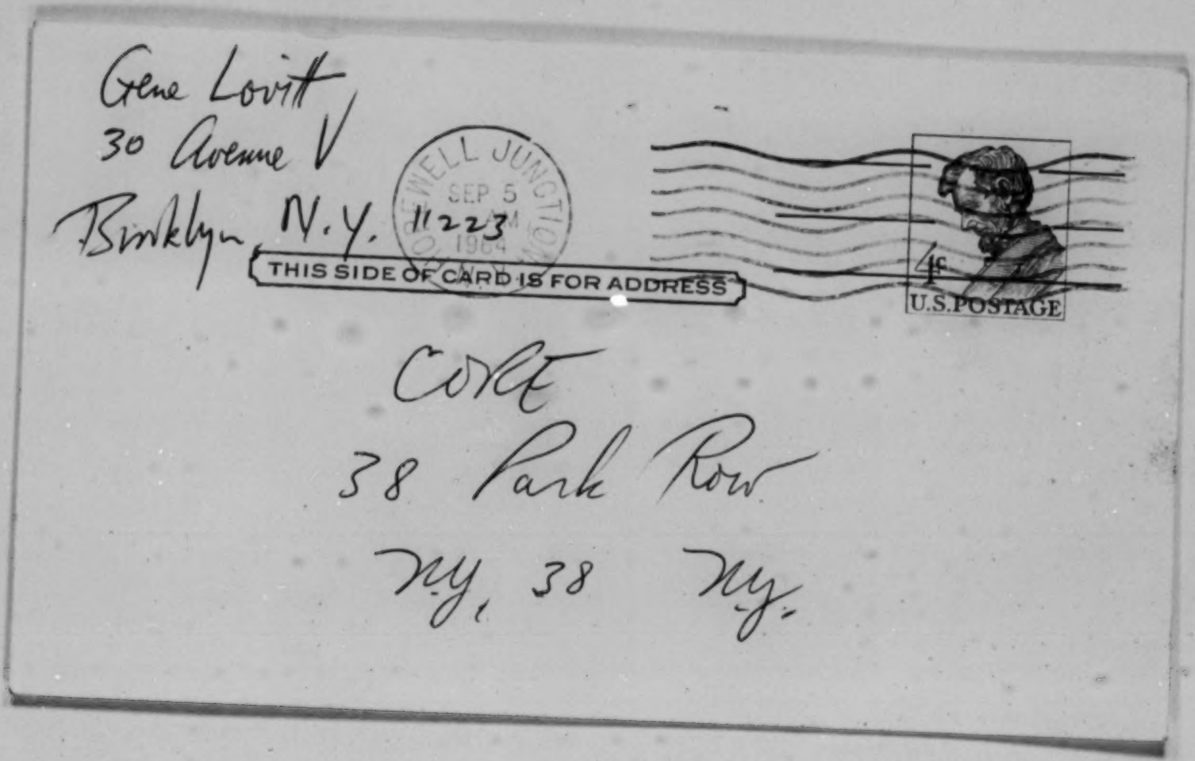
Dear Mr. Schiffer:

Thank you for your letter of September 3rd, 1964, inclosing transcripts of statements taken from witnesses in the above entitled matter. It was thoughtful of you to give me this help and I appreciate your cooperation.

Very truly yours,

Hubert T. Delany
HUBERT T. DELANY

Hd/rt



Gene Lovitt
30 Avenue V
Brooklyn, N.Y. 11223

EWELL JUNCTION
SEP 5
AM
1964

THIS SIDE OF CARD IS FOR ADDRESS

4¢
U.S. POSTAGE

CORE
38 Park Row
N.Y., 38 N.Y.

Gentlemen:- Rachlin

Please send me a copy of your report on the Gilligan affair. I am deeply distressed by the fact that the grand jury has found Gilligan guiltless. What is your side of the story?

Thank you

Gene Lovitt

Come in to read -
no extra copies

General

September 15, 1964

Mr. Gene Lovitt
30 Avenue V
Brooklyn, N.Y. 11223

Dear Mr. Lovitt,

We appreciate your interest in CORE's report on the Gilligan case.

We do not have sufficient extra copies of the report to send you one, but we would be glad to have you come in to read one of our office copies. The National office is open on Wednesday nights for volunteer activities, and we could arrange to have a copy available for you at that time, if that would be convenient.

Very truly yours,

Hannie de Leeuw
Secretary to Carl Rachlin,
General Counsel

File Powell

Rochlin

ack

SEP 21 1964

1618 Benson St.
Bronx 61, N.Y.
Sept. 20, 1964

Congress of Racial Equality
38 Park Row
New York, N.Y.

Gentlemen:

I have been interested in the Powell case since the boy was shot. I have studied statements made and evidence produced.

What surprises me is that your organization did not ask the police to produce the knife with which the Powell boy was allegedly armed.

According to newspaper accounts a substitute teacher found a knife situated eight feet down the sidewalk and two feet out from the curb between parked cars.

The Medical Examiner reported that Powell fell to the ground where he was shot, because there were no bruises on the body. I interpret this to mean that the boy crumpled right where he was shot.

Accepting the Medical Examiner's report, I must conclude that, if Powell had had a knife in his hand when he was shot, the knife would have fallen within a foot of his body - not eight feet down the street from the body and two feet out from the curb.

That isn't all. If Powell really had had a knife, not only would the police have pounced upon it as evidence, but they would have displayed it for the photographers, and all the papers would have spread pictures of it all over their front pages.

It seems incredible to me that no one, including the grand jury, thought to inquire about the knife.

Very truly yours,

Michael J. Kilgallen

Michael J. Kilgallen

NOV 10 1964

Rachlin

Rec'd 11/11

Congress of Racial Equality
38 Park Row
New York City

11/9/64

Gentlemen:

Do you have any copies available of your Report on the Gilligan-Powell Case issued about Sept.4 at the time of the Grand Jury exoneration? If so, how do I go about getting it?

I read excerpts from it in the N.Y Times, but what I now need is the complete Report. I intend to put it to good use in a Thesis I plan to write on the sociology of "justifiable homicide" My interest is not solely academic since I too would like to see something done to modify our barbaric penal code.

Keep up the good work!

Thank you

Sincerely,
H Breban
H. Breban

To

H. BREBAN
128 SEAMAN Ave
NEW York 34, NY

file Powell

NOV 16 REC'D

LAW OFFICES
SCHIFFER & COHEN

BARRY LEE COHEN
GEORGE SCHIFFER

40 EAST 49TH STREET
NEW YORK 17, N. Y.
PLAZA 2-8060

November 13, 1964

Hon. Edward F. Cavanagh, Jr.
Deputy Mayor of the City of New York
City Hall
New York, New York 10007

Dear Deputy Mayor:

Some months ago Mayor Wagner publicly announced the establishment of a police brutality review procedure under your direction. Thereafter you advised me that this procedure would involve the review of findings of the Police Department's Civilian Complaint Bureau, including, if necessary, complete reinvestigation by attorneys of your staff.

This is, therefore, to request, on behalf of CORE, that you undertake an immediate review and reinvestigation of the Gilligan case.

Our own investigation of the Gilligan case indicated that the killing of the Powell boy occurred in questionable circumstances. We stressed, in our report, that the interpretation of applicable law advanced by Mr. Hogan was in our opinionerroneous and that Mr. Gilligan's behaviour could hardly be considered proper police practice. The killing in broad daylight, of a small 15 year old boy by a large, highly trained police officer cannot constitute good police work, whatever the applicable rule of law.

The action of the police review board shocked us because it virtually commended the killing. By concluding that no police rules had been violated, the Board has approved Gilligan's conduct. This is intolerable, as a decision on the facts of this case and as a precedent.

The procedure of the Civilian Complaint Bureau investigation was secret and evasive. We were given an undertaking that we would have an opportunity to present our views and witnesses. This undertaking was not honored. It appears that the Police Department investigation was carried out while I was in Europe and, although responsible officials of the Department well knew of my primary concern with the case, no effort was made to even contact my office. Neither was any effort made to contact any other CORE officials. The Police Department findings are therefore partisan, suspect and entitled to no weight whatsoever since they result from *in camera* proceedings.

The issuance of the findings of the Department by Commissioner Murphy and the presence on the Board of the Police Department's public relations man show further that these findings are so partisan as to be entitled only to disdain. Indeed, the entire handling of the Gilligan case by the Police Department shows such gross insensitivity and contempt for the public that the removal of those responsible is plainly indicated.

We further question the return of Gilligan to duty in which he is entitled to go armed. Without regard to any question of criminal responsibility, the man has killed. A killer ought not to be armed, especially with the Police Department's endorsement, so that he may feel free to kill again. Even if his conduct had been entirely proper, he ought not hereafter be put into a position where he might again have occasion to use a weapon.

In our view, the laws and the Police Department regulations regarding policemen's use of force, and particularly deadly weapons, require substantial revision. In reconsidering the Gilligan case, we urge you to give thought to the question, whether policemen are not under a special duty, because of their training, to use restraint and to avoid the use of firearms. We urge you to examine the facts of this case from the viewpoint that a trained, large man ought not to use a gun on a boy, even if the boy has a knife.

If the procedure publicly announced by the Mayor has any validity whatsoever, then the public and Mrs. Powell are entitled to a frank, honest, complete and open disclosure of all the testimony in the Gilligan case and to an objective review of the Police Department handling of it.

Yours very truly,

GEORGE SCHIFFER

GS:mac

cc: Hon. Robert F. Wagner, Mayor
Mr. James Farmer, CORE
Carl Rachlin, Esq.
Deputy Comm'r Walter Arm

CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK 7, N.Y.

EDW. F. CAVANAGH, JR.
DEPUTY MAYOR

November 16, 1964

George Schiffer, Esq.
Schiffer & Cohen
40 East 49 Street
New York 17, New York

Dear Mr. Schiffer:

I have your letter of November 13th relating to the Gilligan case.

Mayor Wagner in establishing the Mayor's Review Committee specifically limited the jurisdiction of the committee to those complaints relating to incidents which occurred subsequent to July 20.

It was not contemplated by the Mayor that the committee would review the Gilligan case or any other matters which had occurred on an earlier date.

Very truly yours,

Edw. F. Cavanagh, Jr.
Deputy Mayor

a national organization with affiliated local groups working

CONGRESS OF
CORE
RACIAL EQUALITY

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-6270

James Farmer
national director
Richard Haley
associate
Gordon Carey
assistant
Carl Rachlin, Esq.
general counsel

ADVISORY COMMITTEE
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James Baldwin
Roger N. Baldwin
Katrina M. Barnes
Algernon D. Black
James B. Carey
Allan Knight Chalmers
Grenville Clark
John Cogley
Earl B. Dickerson
Eugene E. Frazier
Harold Gibbons
Roland B. Gittelsohn
Sidney Hollander
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E. Stanley Jones
Bishop F. D. Jordan
Martin Luther King
Douglas Levin
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Will Maslow
A. J. Muste
Dorothy Norman
A. Philip Randolph
Ira DeA. Reid
Walter P. Reuther
Hobson R. Reynolds
Jackie Robinson
Arnold M. Rose
Fred M. Shuttlesworth
Lillian Smith
C. K. Steele
Gardner Taylor
Howard Thurman
Bishop W. J. Walls
Goodwin Watson
Joseph Willen
Jerry Wurf
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treasurer
James Peck
CORElator editor

STAFF
Norman Hill
program director
James McCain
director of organization
Marvin Rich
community relations director

November 16, 1964

Mr. H. Breban
128 Seaman Avenue
New York 34, N.Y.

Dear Mr. Breban,

With regard to your request for a copy of CORE's report on the Gilligan case, I regret to say that we are down to only one or two copies.

Would you care to come into the office to read it? Or, we can make a thermofax copy for you, if you will be good enough to send us a $1 to cover the cost of making such copies.

1.00

Thank you for your interest.

Very truly yours,

Hannie de Leeuw
Legal Department

Nov/22/1964

HdL

Thank you for your trouble: May I have one thermofax copy as stated above I enclose $1.00 to cover cost

Keep up the Good work!

Sincerely
H.J. Breban

H.J. BREBAN
128 SEAMAN Av
New York 34, NY

Gilligan

COPY

LAW OFFICES
SCHIFFER & COHEN

40 EAST 49TH STREET
NEW YORK 17, N.Y.
PLAZA 2-8060

BARRY LEE COHEN
GEORGE SCHIFFER

November 24, 1964

The Honorable Robert F. Wagner, Mayor
Office of the Mayor of
The City of New York
City Hall
New York, New York 10007

Dear Mayor Wagner:

Deputy Mayor Cavanagh has advised me in writing that in instructing him to organize a review procedure for police brutality cases, you excluded from his jurisdiction the Gilligan case.

You are aware that the Civilian Complaint Bureau procedure in the Gilligan case was initiated on a complaint from CORE. You will be further aware that, despite an undertaking from the Bureau, CORE had no opportunity to be heard in connection with any of the proceedings of the Police Department in relation to Gilligan.

As has been previously communicated, CORE regards the proceedings and findings of the Police Department in the Gilligan case entirely untrustworthy. More, these proceedings having been conducted _in camera_, the public has been deprived of access to the facts and the basis of deliberation of the Police Department. The Police Department's conclusion, that a 200 pound policeman, with citations for disarming adult criminals, violated no police regulation in shooting to death a 122 pound boy, deserves the most stringent reexamination.

COPY

In behalf of CORE, I therefore suggest that you either extend Deputy Mayor Cavanagh's authority to include a review of the Gilligan case or that you make other provision for the prompt, open and intensive reinvestigation of the Gilligan case. Further, it is requested that the Police Department be instructed to assign Gilligan to such duty that his carrying of arms may be prohibited.

Very truly yours,

GEORGE SCHIFFER

GS:mac

cc: James Farmer
Carl Rachlin
Val Coleman

Rachlin

CORE
38 Park Row
New York NY

DEC 10 1964

12/8/64

Gentlemen:

I hate to trouble you during the Xmas season, but I do need that copy of the CORE REPORT on the Gilligan-Powell case! A few weeks ago, as per i nstructions from you r office, I mailed a dollar bill for one copy of that Report. To date, I have not received one.. PLease set me straight as to juat what happened?

THANK YOU

Sincerely
H Breban
H. Breban

H Breban
128 Seaman Ave..
New York 34, N.Y..

Sent 12/10/64

[1964]

Powell

INTER-OFFICE MEMORANDUM

TO: James Farmer
Marvin Rich
Clora Coleman

FROM: Carl Rachlin

RE: James Powell Case

This is to remind you that nowhere in Hogan's report re Gilligan is there mention of the testimony of the people who were nearest (about eight feet) to the event.

An Italian Government official and a middle-aged lady were walking by at that very moment and

a. saw no knife in Powell's hand,

b. did not see Powell physically touch Gilligan, and

c. no reference to the medical history of Gilligan was made.

CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK 7, N.Y.

EDW. F. CAVANAGH, JR.
DEPUTY MAYOR

February 5, 1965

Mr. George Schiffer
40 East 49th Street
New York, N.Y. 10017

Dear Mr. Schiffer:

This will acknowledge your telegram to the Mayor regarding the Gilligan case.

May I assure you the Mayor shares your deep interest in all of these matters and carefully considers all aspects of the problems to the end that they are thoroughly and objectively resolved.

Faithfully,

Edw. F. Cavanagh

Edw. F. Cavanagh, Jr.
Deputy Mayor

Powell
Gilligan

DEC 6

DONNER & PIEL
ATTORNEYS AT LAW
36 WEST FORTY-FOURTH STREET
NEW YORK 36, N. Y.

FRANK J. DONNER
ELEANOR JACKSON PIEL
SANFORD M. KATZ

MURRAY HILL 2-8288
CABLE: DONKIPP

December 3, 1965

Mr. Carl Rachlin
Congress of Racial Equality
38 Park Row
New York, N. Y.

Dear Mr. Rachlin:

Many thanks for the loan of this document. I had thought it had gone back to your office before this.

We appreciate all the cooperation you have given us.

Sincerely,

Eleanor Jackson Piel

Eleanor Jackson Piel

EJP:z
enc.

[Enclosed, Piel to Rachlin, 1965, Dec. 3]

Powell

REPORT BY DISTRICT ATTORNEY OF NEW YORK COUNTY

At approximately 9:30 on the morning of July 16, 1964, James Powell, a fifteen year old boy, was shot to death by Lieutenant Thomas Gilligan, a New York City police officer. The office of the District Attorney of New York County immediately commenced an investigation. An exhaustive search for all possible witnesses was conducted.

On July 21st the Second July Grand Jury began hearing evidence presented by Assistant District Attorney Alexander Herman, Chief of the Homicide Bureau, and Assistant District Attorney Martin J. Heneghan. The jury held fifteen sessions and heard forty-five witnesses. Under the law, the testimony of these witnesses before the grand jury is secret. However, all known witnesses, including those referred to the office by various organizations, were interviewed by members of the District Attorney's staff.

The grand jury now has concluded that, on the basis of the evidence and the applicable rules of law, Lieutenant Gilligan is not criminally liable for the killing of young Powell. In view of that determination and in light of the great public interest evinced in the case, the District Attorney's office has prepared this report, summarizing in detail what has been learned in the course of the investigation. Appended hereto is a statement of the controlling legal principles.

The Scene and the Incident Preceding the Shooting

Although there was disagreement among many of the witnesses with respect to the details of the shooting itself, there was substantial agreement concerning the essential facts of the incident which preceded the encounter of James Powell and Lieutenant Gilligan.

At about 9:15 on the morning of July 16, 1964, the superintendent of 215 East 76th Street and three other buildings on the block, had commenced his morning task of watering the flowers and plants in front of No. 211 and the two trees in front of No. 215. Across the street on the south side of the block, and somewhat east of No. 215, is the Robert Wagner Junior High School. As was common, a number of the summer session students--estimates ranged up to one hundred--were standing about on both sides of the street, leaning against cars, or sitting on stoops. Whether intentionally or not, the superintendent wet a few of the children who were in the immediate vicinity. Some of the youngsters then began throwing garbage can covers and bottles. One boy came at the superintendent with a lid in one hand and a bottle in the other. Dropping the hose, and running into No. 215, the superintendent was hit in the shoulder by the bottle, while the cover broke one of the panes of the outer door of the building.

No. 215 is an apartment building. Two steps, a total of ten and one-half inches in height, lead to the stoop landing, which is four feet three and one-half inches deep and four feet nine inches wide; another step leads to the outer door. On each side of the landing is a wall two feet four and one-half inches high topped by a railing two feet high. From the building line to the curb is a distance of fifteen feet two inches. On the west side of the stoop at No. 215 is a television service store and on the east side a cleaning store. Parked in front of the building that morning was the service truck of the TV store, and behind the truck a passenger car.

Medical and ballistics evidence

An autopsy was performed by a Deputy Chief Medical Examiner. Examination of the body showed that Powell was 5 feet 6 1/2 inches tall and weighed 122 pounds. He had been struck by two bullets. One bullet entered the lower part of the right forearm, just above the back of the wrist and came out the other side. This bullet then pierced the deceased's chest above the right nipple, and came to rest in the left lung. Death as a result of this wound alone would have followed anytime within minutes to a half hour. The other bullet entered just above the navel to the left of center, and emerged at the opposite point in the back, having pierced the abdomen and a major vein. This wound could likewise have been fatal. There was no evidence on the body of smoke, flame or powder marks, thus indicating that both bullets must have travelled more than a foot and a half before striking Powell.

A ballistics expert examined Powell's clothing in the hospital. There were no powder burns or scorch marks on the clothing, and, therefore, in his opinion, the gun must have been farther than two feet from Powell's body when fired. A survey was made of the hallway of No. 215. Lodged in the jamb of the inner door, forty inches above the floor, was a deformed .38 caliber bullet. This bullet had first pierced a glass panel of the outer door, thirty-five inches above the floor. Thus, the bullet had been travelling at an upward angle. The position of the bullet and the depth of its penetration in the jamb, as well as the size and shape of the hole in the outer pane, nullified any possibility that it had first passed through Powell's body before reaching the hallway. The absence of any impact marks on the newly cemented sidewalk negated any possibility that Powell had been shot in the abdomen while lying on the ground.

Two of the bullets were too deformed for comparison. But ballistics tests of the bullet lodged in the chest proved that it had been fired from Gilligan's gun which, when examined, contained six cartridges, three discharged and three live.

The following day Gilligan was examined by a doctor, after having received first aid the day before at Roosevelt Hospital, where a splint had been applied to his right hand and forearm. The doctor diagnosed the injury as abrasion of the right upper forearm, superficial loss of skin on the right upper forearm, contusion and sprain of right hand and wrist, and recurrence of a previous sacroiliac injury resulting in a severe twisting of the back. The tissues of the right arm gave evidence of a sharp blow on the lateral margin of the right hand and forearm.

Students

Fifteen teenagers, eight girls and seven boys, were questioned. Almost all had been friends of Powell, or had known him by name or sight; all, except one, were summer session students at the school.

Two boys, friends of the deceased, described his actions shortly preceding his encounter with Lieutenant Gilligan. That morning they had travelled with Powell from their homes in a housing project in the Bronx to the school. Powell showed them two knives, one with a red handle, the other black-handled, and let each of them keep one for him. After the superintendent had fled into the building, Powell crossed to the school side of the street and, according to the boy who had it, demanded the red-handled knife, stating, "I am going to cut that ***." The boy said he pretended not to have the knife. After some argument, Powell approached the other boy who said Powell asked for the black-handled knife, adding that he would be right back. The boy gave him the knife and, shortly thereafter, Powell was seen crossing the street, opening and closing the blade. A girl, who was following behind him, stated Powell told her that he was going to talk to the man. Pleading with him not to go, because there was liable to be trouble, she said she grabbed at him in an unsuccessful attempt to restrain him.

The recitals of what occurred at this point differ. The girl, who was following Powell and who had now stationed herself near the stoop, stated that he walked up the steps of No. 215, opened the door all the way, at which time Gilligan, coming from the direction of the TV store, stopped in front of the building, and, still on the sidewalk, shouted to Powell, causing him to turn around. Three students agreed with this account. But three other students claimed that Gilligan was already on the stoop facing the street, when Powell approached the building. Another three youngsters reported that both were on the sidewalk, facing each other in an east-west direction, when the shooting started. And, finally, two girls were positive that Gilligan followed Powell out of the building before he shot him.

In any event, several students recalled that the girl by the stoop yelled to Powell that the man had a gun. According to her, Powell, having turned around, then raised both hands whereupon Gilligan walked up the stoop and, approximately a foot and a half away from Powell, pushed his right hand. A boy, standing on the school side of the street said he also saw Gilligan grab at Powell's right hand, while others claimed that he turned the boy around so as to face him. A number of the students recounted that Powell was either waving or raising his arms, and one said he was flinging them as if to strike at the officer. None saw a knife in Powell's hand at this point, although one boy said he might have had a beer can in his hand, and one girl claimed that in fact he was holding a beer can in his right hand. Two students later saw a knife lying in the street near the curb.

Regardless of the nature of the encounter or the position of Powell and Gilligan, it was undisputed that a shot was soon fired. According to the girl by the stoop, the officer held his gun at waist level and fired one shot, causing Powell to fall to the sidewalk. Seven students only heard the first shot, their attention having been diverted, or their view having been blocked by other people or the parked vehicles; seven others simply stated that the officer fired a shot. One of the latter group expressly noted that the officer pointed the gun at Powell's right hand and then fired.

Almost all the students agreed that Powell fell after the first shot. According to the most frequent account, after Powell fell to the sidewalk on his hands and knees, the officer, still on the steps, pointed the gun down and fired two more shots at Powell's back. Two youngsters said Powell had first dropped to his knees clutching his abdomen. One girl was certain that Powell was lying on his back when Gilligan fired the final two shots down at him. Altogether, ten students reported that Gilligan fired two shots at Powell when he was down on the ground after having fallen from the first shot. But one of these witnesses was shown photographs of the hallway, proving a bullet had pierced a window of the outer door and had lodged in the jamb of the inner door. After looking at the photograph he said he was not sure of what he had seen. Upon further reflection he admitted that, in fact, he had not seen the shooting at all.

Of those who claimed to have seen the shooting, some acknowledged that their view was obstructed by the truck parked in front of No. 215, or by other children; some heard but did not see the last two shots;

others admitted running for cover when the shooting started. All agreed that after the first shot there was a pause, then two shots in succession, and, finally, Powell lay flat on his stomach, body parallel with the curb, head towards Third Avenue, while Gilligan stood over him holding the gun pointed at the body. Many of the students claimed that Gilligan then either nudged or pushed or kicked Powell over onto his back. But when Powell's two friends, who had been holding the knives for him, ran over from the opposite side of the street, after having heard the three shots, Powell was still face down and Gilligan stood over him rubbing his fingers. The boy who had given Powell the knife asked Gilligan why he had shot him. Gilligan replied, "This is why," taking from his pocket a badge which he pinned to his shirt. Asked why he didn't call an ambulance, Gilligan said that Powell was his prisoner and directed the boy to call the ambulance. The boy, who had refused to give Powell the red-handled knife, heard Gilligan say that Powell had tried to kill him and that he had a knife under him.

Adults

Various aspects of the events, prior to, during and subsequent to the shooting, were observed by eight passersby, two store owners, two neighborhood workmen, five teachers, and a priest. According to one of the owners of the TV store, Gilligan came in with a radio to be fixed and asked what was going on in the street. Told that the young people were just acting up, Gilligan remarked that he did not want to get involved in anything, that he wanted to have his radio fixed and leave. The shopkeeper saw the youths start throwing garbage can covers and soda bottles. There was a crash and he saw the superintendent run into the building. Gilligan then ran out the door.

Seven other people, a couple walking by the building, a practical nurse standing on the other side of the street, a truck driver walking to work, a bus driver on his way from work, the cleaning store owner, and a teacher looking out a third story school window, stated that Powell had run, leaped or swaggered onto the stoop, heading towards the entrance to number 215. Some saw Powell enter the building. Gilligan appeared from the direction of the TV store and, according to most versions, was standing on the sidewalk somewhere near the stoop when Powell started back down the stoop towards the street. Gilligan, according to the man in the television store, shouted, "Stop". Extending his left hand, he said, "I'm a lieutenant, drop it"; in his right hand he held a gun. Standing in the entranceway of the store, the owner looked to the doorway of the building and saw the head and shoulders of someone coming out in a crouched position, clenced hand raised to shoulder level. A bus driver standing near No. 209 said that Powell had a knife in his right hand and was moving off the stoop towards the officer, who was on the sidewalk facing the building. He related that Gilligan, holding a badge in his open palm, had shouted, "Stop, "I'm a cop". An air conditioning mechanic, whose truck was halted by traffic about three buildings west of No. 215, heard someone shout, "Stop and drop it". From his elevated cab, he then saw Powell standing with one foot on the sidewalk and one foot on the bottom step of the stoop. Facing Powell, about two or three feet away was Gilligan. A knife in his right hand, the boy paused, raised it to about head level away from his body, and started to come down with it, striking at Gilligan. There was a shot. Powell started to slump but came up again. He raised the knife and again swung at Gilligan. There was another shot. Traffic started to move, and the witness drove away towards Second Avenue. A workman on a scaffold four buildings east of No. 215 looked in the direction of the building after the first shot. According to his version, Powell was moving rapidly and coming down from the stoop but still on the landing while Gilligan was on the sidewalk in front of the TV store. In his right hand Gilligan held some object and his left hand was partially outstretched. Powell, with his hands raised and fists clenched, also held an object in his hand. As he then climed up the rope of the scaffold to safety, he heard two more shots.

Other witnesses differed concerning the positions of Gilligan and Powell. A truck driver, who was standing in front of the cleaning store insisted that Gilligan had followed Powell into the building and that they were both still in the hallway when the three shots were fired. Two witnesses maintained that one or all three shots were fired from the street into the hallway, while one passerby said Gilligan was in front of the TV store window when he fired toward the door. A teacher who was standing by a fourth story window when the first shot was fired thought that Gilligan was facing the street and Powell the building when the next two shots were fired.

All the witnesses who heard three shots, except one, agreed that the first shot was followed by a pause and then two shots in succession. All, who had seen Powell fall to the sidewalk, recalled that he did not reach the ground until all three shots had been fired. Powell lay on the sidewalk face down, while Gilligan stood over him, pointing his gun at him. The TV man heard the officer tell Powell not to move. Two teachers, looking from the third and fourth floor windows, respectively, claimed that Gilligan then pushed Powell over onto his back. A man standing by the cleaning store maintained, however, that an ambulance attendant turned over the body, and a man who had been working in a nearby building said that a clergyman and a police officer turned Powell over onto his back. But the priest who arrived on the scene stated that Powell was already on his back when he arrived. Two men heard Gilligan say that there was a knife under the boy. They also noticed a badge hanging from Gilligan's pants pocket.

Two other witnesses saw a knife in the street after the shooting. A young school teacher who lives in the neighborhood noticed a knife blade lying next to Powell's thigh, between his body and the stoop. While standing there she saw someone kick the knife toward the curb. A teacher who ran out of the school after the shooting saw a knife lying in the gutter about ten feet from Powell. The blade was open. He picked it up, closed it, and gave it to a police officer. Powell's young friend later identified this knife as the black-handled knife he had received from Powell and returned to him just before the shooting.

Police officers

Several uniformed police officers arrived at the scene approximately 9:30. Two saw Powell lying face down with his left arm partly under his head. One of them turned Powell over in an attempt to administer first aid. The other officer was handed the black-handled knife by a teacher. Now in the District Attorney's custody, this knife, open, measures eight and seven-eighths inches. Its single blade is three and one-half inches long.

Statement of Lieutenant Gilligan

Lieutenant Gilligan is thirty-seven years old, has been a policeman for seventeen years. He is six feet, two inches tall, and weighs about two hundred pounds. Questioned extensively, Lieutenant Gilligan gave the following version of the events. July 16th was his day off. His radio having gone dead that morning, he decided to take it to the Jadco TV Service Company, located at 215 East 76th Street in the precinct where he formerly worked. Arriving at about 9:30 or 9:25 a.m., he noticed two groups of youngsters standing around a man who was hosing the sidewalk. Upon entering the store, he was told that there had been some trouble earlier and that the police had been called.

Suddenly, Gilligan heard the sound of breaking glass and saw people running in the street. Dropping the hose, the superintendent ran into the building. A boy, following behind, threw a bottle and garbage can cover at the man and ran away. Gilligan then stepped outside and spotted Powell running around the front of the parked service truck towards the building, yelling, "Hit him, hit him, hit him." In his right hand, held close to his chest, was an open knife, blade pointed down. Powell ran towards the hallway. Gilligan, removing his badge from his left trouser pocket and his revolver from his right pocket, moved to a point in front of the stoop, facing the building entrance. By this time Powell was just inside the hallway at the outer door. Holding the shield in his outstretched hand in front of him, Gilligan said, "I'm a police lieutenant. Come out and drop it." Looking over his shoulder, Powell glanced from the badge to the gun. Gilligan repeated the warning. Powell turned, raised the knife in front of his chest and lunged at the officer. Pointing the gun to his left, Gilligan fired a warning shot into the building and again told him to stop. Powell, now close to the edge of the stoop landing, struck at the officer with the knife. Gilligan blocked it with his right hand, which still held the gun, and attempted to push Powell back, but the knife scraped along his arm causing it to bleed and later to swell. Powell was bent back but again struck with the knife. This time Gilligan, who claims to be an expert shot, pointed his gun slightly upwards and fired at the raised hand, seeking to dislodge the knife. But Powell, still above the officer on the stoop, again lunged forward, knife hand pumping. Gilligan stepped back and fired into the boy's midsection. Powell staggered and collapsed onto the sidewalk, face down. The knife lay nearby. Gilligan backed around onto the stoop, holding the gun down by his side.

APPLICABLE LAW

1. The killing of one human being by another is a criminal homicide, unless the act is "justifiable" or otherwise excused by law.

2. Deadly force is justifiable if used in self-defense, whether by a private citizen or a police officer. The theory of self-defense may be termed, "reasonably apparent necessity": deadly force is justified if the slayer has a reasonable basis, in all the circumstances, for believing at the moment of the slaying that such force is necessary to prevent imminent, grave personal injury to himself.

If James Powell did not attack Lt. Gilligan, or attacked him but without a dangerous weapon, and Gilligan had no reason for believing that he was in imminent danger, the shooting was not justified as self-defense. If Powell attacked Gilligan with a knife, but there was a reasonable alternative to shooting, Gilligan was obliged to make every effort, consistent with his own safety, to avoid the danger before using fatal force. He could shoot without retreating, however, if it was reasonable to believe at the moment of the attack that retreat was impossible or would have increased the danger. This is so even if, upon subsequent reflection, it appears that such belief was mistaken, and there was an opportunity to retreat without increasing the danger.

3. Deadly force is justifiable not only under the law of self-defense, but also under certain principles governing the use of force by a police officer in the performance of his duties.

At all times, a New York City policeman is required to carry his service revolver, and bound to protect life and property, prevent crime, and arrest offenders. If, while "off duty", Gilligan observed a public disturbance, he was obliged to intercede, and could arrest any person on reasonable grounds for believing that he was committing a crime or offense in the officer's presence. Homicide is justifiable when committed by a police officer in attempting lawfully to apprehend a person for a crime actually committed, when the circumstances are such that one would have reasonable cause for believing that the crime was a felony, and that deadly force is necessary to apprehend the suspect. Assault with a knife, and assaulting a police officer with intent to resist lawful arrest, are felonies.

Therefore, if Gilligan was acting as a police officer, and lawfully attempting to apprehend Powell for some crime or offense committed in his presence, such as possession of a knife with intent to use it unlawfully upon another, or disorderly conduct, and Powell resisted arrest by assaulting Gilligan in any manner, this assault was a felony; if Powell assaulted Gilligan with a dangerous weapon, a separate felony was committed. The officer was then entitled to use deadly force to apprehend Powell, but only if he had a reasonable basis for believing that such force was necessary.

4. The presumption of innocence applies in the grand jury room. The grand jury ought to find an indictment only when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by a trial jury by a verdict of guilty beyond a reasonable doubt. The grand jury should consider all the evidence, and where there appear irreconcilable discrepancies, the grand jury should resolve issues of credibility.

Thus, no indictment could be found against Lt. Gilligan unless at least twelve of the grand jurors concluded that a petit jury would be persuaded by the evidence that, beyond a reasonable doubt, the killing was unjustified.

[1965?]

Editor, New York Times Magazine
229 West 43rd St.
New York, NY

Dear Editor,

Gertrude Samuel's article, "Who Shall Judge A Policeman?" in the August 2nd Magazine is a welcome attempt to add to the meager public knowledge of what is at issue in the current controversy overm an independent civilian review board for New York City. However, Miss Samuels fails to answer the question of why tension exists between citizens and policemen in Harlem and the other ghettos.

The implication of the Samuel's article is that, while there may be some police misconduct, the real problem is "public distrust" of the police and the "cynical belief" that the present system of internal police review leads to white-washing. The best argument for an independent review board is, therefore, that it will help clear the air of charges and counter-charges and provide a"safety valve" for community discontent.

It is our belief that this attitude is a reflection of the popular theory that hostility toward the police in minority communities is only a special manifestation of anger and resentment toward the white world aroused by the horribly substandard condition of the ghetto. The policeman, as the symbol of white power, becomes the target of a great share of that anger and resentment.

In point of fact, that hostility toward the police is a more clear-cut matter than simply one of racial tension. The people of Harlem fear, distrust, and resent police as police because many *are* brutal, because many do make excessive use of force. Inside the precinct house, many policemen and detectives do unnecessarily beat people who have been arrested on minor charges under the slightest pretext (or even [illegible] no pretext as in the case of the CORE leadership people at the 123rd St. Station). They do deal often more harshly with rioters in Harlem than with rioters on Mulberry Street. Many do ignore, or even protect, the salesmen of dope and vice, while physically mistreating the petty criminal or, sometimes, the innocent.

A fact of police behavior in many communities is that the policeman is often more easily inclined to ~~xxxx~~ treat the poor, the Negro, the socially and politically powerless in a more abusive and arbitrary way than the middle-class white.

-more-

Given that he can get away with a great deal in Harlem, what prompts some policemen to try? In some cases, no doubt, the answer is racism. In a great many more it is fear. And it is this fear that perpetuates the tension. For as the policemen toughens himself against his own fear and strikes out more and more viciously, the anger and resentment of the community sharpens/

At some point we must break through the vicious circle of mutual fear. CORE believes that a first, and mandatory step towards this goal is to privide the people of the minority communities with effective and trustworthy protection against police abuse. An independent civilian review board can begin to provide the needed protection.

The arguments raised by police officials in opposition to such a board, are at the very least flimsy. It is clear that a large segment of the community does not have confidence in the present system of departmental review.It is equally clear that a large segment of the community is convinced that the "excessive use of force" is widespread.As for the morale of the policeman on the beat, there is no reason to believe that the morale of any policeman who really believes in an honest and fair administration of his duties whould be affected.

Frankly I doubt very much if the present departmental review system reflects anything close to the Anglo-Saxon legal concept of a "jury of his peers."

Sincerely Yours,

Val Coleman
Assistant Community Relations Director
National CORE

January 2, 1967

Hon. Bernard Botein
Presiding Justice
Supreme Court, State of New York
Appelate Division, First Department
Madison Avenue & 25th Street
New York, New York 10010
Attention: Hyman W. Gamso, Chief Clerk

Re: GILLIGAN v. JAMES FARMER, et al,
Index No. 15092/65

Dear Sir:

The record in the above entitled case was filed on December 7, 1967. Due to certain technical faults in the brief, it was impossible to file it at that time. The corrections of these technical imperfections was complicated by a very heavy schedule in our office including the preparation of an argument before the United States Court of Appeals for the Fifth Circuit, in the case of STEELE v. TAFT.

For the above reasons we ask your leave pursuant to Rule II (1) (a) and (b), to file the brief in the above entitled case beyond the 20 day limit and further to allow the case to be placed on the calendar for the February 1968 term.

Respectfully yours,

Carl Rachlin

CR:n

(1968)

RECEIVED
JAN 4 1968
SEDF

866 Third Avenue
10th Floor
New York, New York 10022

January 3, 1967

Marvin Rich, Esq.
Executive Director
Scholarship, Education and Defense
Fund for Racial Equality
150 Nassau Street
New York, New York 10038

Re: Expenses of preparation
of two briefs in the two Gilligan
v. Farmer cases

Dear Marvin:

As you will recall and as Carl will confirm, the briefs in the two Gilligan v. Farmer cases were prepared in extremis, from 5:00 p.m. on a Friday afternoon to 4:30 a.m. the following Monday morning. This emergency situation was occasioned by the fact that briefs which had been promised weeks before by Shirley Fingerhood and which were expected to be usable with minor alterations as Jim Farmer's briefs were not prepared as of that Friday afternoon, and, in their absence, I had no choice but to proceed as best I could to prepare submissible documents, which were due to be filed the following Tuesday.

Because of the emergency nature of the work done, it was necessary for me to hire secretarial help at $5.00 per hour. Mary Lodva, my secretary, agreed to perform those services and did so far beyond any reasonable call of either duty or payment of $5.00 per hour. She put in over forty hours that week-end, and for that reason is in my judgement entitled to at least a $25 bonus.

In the foregoing context, the following statement is submitted:

Hours worked by Mary Lodva - 41 1/4 at $5.00 per hour	$206.25
Bonus for Mary Lodva	25.00
Cab fares Friday December 1, 1967	4.00
Dinner (Me, Mary Lodva and Marion Belinki, law student)	25.00
Cab fares Saturday December 2, 1967	8.85
Blue backs for briefs	1.25
Dinner	3.65
Cab fares Sunday December 3, 1967	10.50
Lunch	1.90
Dinner	4.50
Cab fares Monday December 4, 1967 (Messenger)	3.25
Cab fares Tuesday December 5, 1967	6.25
Total	$300.40

Cordially,

Brad

Bradley R. Brewer

BRB:ml

SHIRLEY FINGERHOOD
ATTORNEY AT LAW

1270 AVENUE OF THE AMERICAS
NEW YORK 20, N.Y. · CIRCLE 6-8689

October 30, 1967

Carl Rachlin, Esq.
150 Nassau Street
New York, N. Y. 10038

File

Re: Gilligan v. King, et al

Dear Carl:

The Appellate Division decided to permit the appeals provided that they are noticed for the January term.

I would be glad to discuss the cases with the attorney who will represent Farmer and CORE. I would appreciate it if you would let me know the name, in any event.

Sincerely,

Shirley

SHIRLEY FINGERHOOD

SF:JE

LAW OFFICES OF
RUBIN, WACHTEL, BAUM & LEVIN
598 MADISON AVENUE
NEW YORK, N.Y. 10022
AREA CODE 212 - PLAZA 9-2700

MAX J. RUBIN
HARRY H. WACHTEL
FREDERICK BAUM
ABRAHAM G. LEVIN
JOSEPH B. RUSSELL
BENJAMIN SPIEGEL
JACK G. FRIEDMAN
IRVING CONSTANT
RAYMOND S. HARRIS
DAVID N. BRAININ
BERNARD STEBEL
MARTIN A. COLEMAN

STANLEY L. SKLAR
JOSEPH TAUBMAN
RONALD GREENBERG
SEYMOUR A. CASPER
SOLOMON FISHER
ALLEN S. WILDER
AVROM S. FISCHER
GERALD HARRIS
JAMES A. FREYER
PHYLLIS J. ROBERTS
IRWIN POPKIN

WASHINGTON OFFICE
1100 17TH STREET, N. W.

COPY

November 1, 1967

Eugene L. Girden, Esq.
Coudert Brothers
200 Park Avenue
New York, N. Y. 10017

Re: Gilligan v. Farmer, et al
Gilligan v. King, Epton, et al

Dear Mr. Girden:

This will confirm our understanding that our conference with counsel handling the pending appeals to the Appellate Division, First Department, in the above matters (which the Court set down for the January Term) will be held at this office on Friday, November 10, 1967 at 2:30 P.M.

In accordance with the understanding reached in our recent phone talks, I would appreciate it if you would prepare at our expense and forward to us one xerox copy of the exhibits which you had marked for identification on your examination of plaintiff in the cases of Gilligan v. ABC and Gilligan v. NBC which you are handling, together with copies of the amended pleadings and verified bills of particulars served therein.

Thanks for your courtesy and consideration in these matters.

Sincerely yours,

RUBIN, WACHTEL, BAUM & LEVIN

By: BENJAMIN SPIEGEL
Benjamin Spiegel

BS/as

cc: Carl Rachlin, Esq.
Shirley Fingerhood, Esq.
Alann Lapman, Esq.

SHIRLEY FINGERHOOD
ATTORNEY AT LAW

1270 AVENUE OF THE AMERICAS
NEW YORK 20, N.Y. · CIRCLE 6-8689

November 7, 1967

Bradley P. Brewer, Esq.
Crowell Collier & MacMillan, Inc.
866 Third Avenue
New York, N. Y. 10022

Re: Gilligan v. King, Farmer, CORE:
Index No. 8437/1965

Gilligan v. Farmer and CORE;
Index No. 15092/1965

Dear Mr. Brewer:

Carl Rachlin informed me that you would handle the appeals on behalf of CORE and James Farmer in the above entitled cases. I tried to telephone you yesterday without success.

I don't know if you have obtained the file in these cases. However, I have copies of the notices of appeal which I am enclosing, and would like to point out to you that the motion to dismiss the appeal resulted in a requirement that the appeal be noticed for the January term. Therefore, all papers are required to be filed by December 4th.

Some lawyers who are attorneys in related cases are meeting with me this Friday to discuss the briefs. If you would like to come, please call and I will give you the time and place.

Sincerely,

Shirley Fingerhood

SF/ms
enclosures

cc: Carl Rachlin, Esq.

866 Third Avenue
10th Floor
New York, New York

November 13, 1967

Carl Rachlin, Esq.
SEDFRE
158 Nassau Street
New York, New York

Re: Gilligan Case

Dear Carl:

Enclosed are copies of documents received from Shirley Fingerhood. From her language, her understanding of the situation may not be as you explained it to me.

Gene Eisner has agreed to share this matter equally with me, but we are both adamant about its not being a substantial consumer of time.

Since I don't know Miss Fingerhood, it falls upon you to make our understanding clear to her.

Cordially,

Bradley R. Brewer

BRB:ML
enc.

COPY

LAW OFFICES OF
RUBIN, WACHTEL, BAUM & LEVIN
598 MADISON AVENUE
NEW YORK, N. Y. 10022
AREA CODE 212 - PLAZA 9-2700

MAX J. RUBIN
HARRY H. WACHTEL
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SOLOMON FISHER
ALLEN S. WILDER
AVROM S. FISCHER
GERALD HARRIS
JAMES A. FREYER
PHYLLIS J. ROBERTS
IRWIN POPKIN

WASHINGTON OFFICE
1100 17TH STREET, N. W.

December 12, 1967

Bradley R. Brewer, Esq.
866 Third Avenue
New York, N. Y. 10022

Re: Gilligan v. Farmer, et al.

Dear Mr. Brewer:

We acknowledge with thanks receipt of your brief on behalf of defendants-appellants Farmer and Core to the Appellate Division, 1st Department, on the pending appeal which is to be argued at the January term of the Court, as we are advised. We extend to you and your associates our best wishes for success on the Appeal, which, as your brief shows, is clearly merited.

As counsel for Dr. Martin Luther King, Jr., in the related action entitled Gilligan v. King, now pending in the Southern District of New York (66 Civ. 607) we take the liberty of tendering the following suggestions which you may find useful in connection with any reply or supplemental brief which may be submitted or upon the argument of the appeal, namely:

1. In our opinion, the cogent and well-reasoned arguments made in points I and II of your brief might be reinforced and strengthened as follows:

(a) Full discussion of the case of Washington Post Co. v. Keogh, C. A., D.C., 1966, 365 F. 2d 965, cert. denied 385 U.S. 1011, 87 S. Ct. 708 (granting defendant's motion for summary judgment, dismissing plaintiff's libel suit and ruling in part that "actual malice" under the Sullivan doctrine must be proved and may not be inferred or found on the basis of the defamatory words alone.

(b) Discussion of the facts and the ruling by the Supreme Court reversing the judgment below in the Post-Sullivan cases, Garrison v. Louisiana 379 U.S. 64, 74-75; Collins 380 U.S. 356;

Rosenblatt v. Baer 383 U.S. 75.

(c) Noting that to date the U.S. Supreme Court has not upheld a single libel judgment against a "public official" on the grounds that the test of "actual malice" as defined in New York Times v. Sullivan has not been met.

2. As to Point V in your brief in which you apparently rely on the law of the State of New York, we suggest you consider the following questions:

(a) Whether such reliance on New York State law as governing the case, does not "conflict" with the argument made in the other points in your brief that the governing test is that set forth by the U.S. Supreme Court in New York Times v. Sullivan and the subsequent cases following it. As you know, in Sullivan the U.S. Supreme Court ruled that the requirements of allegation and proof of "actual malice" as therein defined were required by the Federal Constitutional Guaranties of the 1st and 14th amendments which were superior to and superseded the State law.

(b) Whether any reliance by you on New York State law does not open the door to respondents urging that it was proper for Justices Helman and Brust at Special Term to rely on the State law authorities cited in Justice Helman's opinion in the Epton case which apparently made an inference of "malice" based on a lesser standard than the Federal Constitutional test of actual malice" required under the Sullivan doctrine.

Please feel free to use or discard the above suggestions as you see fit. The writer will be glad to discuss any of the above points with you further if you deem it helpful to do so.

Again our thanks for your brief and our best wishes for success on your appeal.

Sincerely yours,

RUBIN, WACHTEL, BAUM & LEVIN

By:
Benjamin Spiegel

BS/ss

cc: Dennison Ray, Esq.
Stephen Nagler, Esq.

(1967)

Re Gilligan Case –

There seems to be a complete record of appeal already made up to The Appelate Division.

A copy is being sent to Mr. Brewer. (including pagination.)

The deadline date is still Dec 4. The case is scheduled for The Jan. term.

As I understand The situation there will be a meeting between Mr. Brewer & Miss Fingerhood after which time further moves will be made. They are consistently missing each other but eventually will cross paths!

Miss Fingerhood has asked me to see if Ad Press still has The type set up since what we have seems to be in The form of proofs.

I am most [illegible] available Through Dick. My home Phone is 824-0812, but frequently no-one is home –

Marian Belenky

Leedom v Kyne
358 US 184
79 S Ct 180

January 5, 1968

Bradley R. Brewer, Esq.
866 Third Avenue
New York, N.Y. 10022
10th Floor

Dear Brad:

Enclosed is our check for $300.40 for expenses with regard to the Farmer vs Gilligan case as submitted in your statement of January 3, 1968. I am glad to hear that the case looks more hopeful.

I think you might want to drop James Farmer a note and let him know the status of the case.

Cordially,

Marvin Rich
Executive Director

Enclosure: (1)
check #2471

cc: James Farmer

File

SHIRLEY FINGERHOOD
ATTORNEY AT LAW

1270 AVENUE OF THE AMERICAS
NEW YORK 20, N.Y. · CIRCLE 6-8689

Feb. 23, 1968

Carl Rachlin, Esq.
150 Nassau Street
New York, N. Y. 10038

Re: Gilligan v. Epton

Dear Carl:

I am enclosing a copy of my brief in the Gilligan case. May I please have a copy of yours.

Best regards.

Sincerely,

Shirley

Shirley Fingerhood

SF/ms
enclosure

RECEIVED

MAR 11 1968

SEDF

866 Third Avenue
10th Floor
New York, New York 10022

Mr. Marvin Rich
Scholarship, Education and Defense
Fund for Racial Equality
164 Madison Avenue
New York, New York 10016

Re: Expenses incurred in connection with preparation of reply brief in two Gilligan v. Farmer cases

Dear Marvin:

As Carl has no doubt already informed you, the arguments before the Appellate Division went as well as could possibly be expected and, indeed, much better than I had dared to hope. My arguments appeared to get through to the Court and to make sense to the members of its panel, and I had some kind of reasonable answer available for all of the questions they asked, some of which were not anticipated.

Based upon the reaction of the members of the panel to oral argument, I think there is a fair chance of a substantial victory in the poster case at least. In the slander case involving the two alleged statements, one involving an accusation of murder in cold blood and the other involving the suggestion that Lt. Gilligan was at the time being treated in a mental hospital, there is a substantial possibility of dismissal in the near future on the murder charge, but I am afraid the same is not true with respect to the mental hospital allegation. However, as I read the law and as I hope to have convinced the Court to read it, Gilligan's counsel has an obligation at this stage of the litigation (a very early stage, since we have not even filed an answer - which usually happens within the first 20 days) a duty to show, either in an affidavit or in a revised complaint, that they have available admissible evidence with which to show to a high degree of certainty that Farmer and National CORE knew about preparations for the poster, talked with those directly responsible for its issuance about it, planned the poster with them, and in effect were involved in a conspiracy or mutual agreement to defame Gilligan through the poster.

Then with respect to both cases, they must show in the same way that they have admissible evidence to show with a high degree of certainty (a) that the alleged factual misstatements were made with actual knowledge that they were false or (b) with actual knowledge (based upon information) that the statements were probably false and that the defendants acted, not negligently but with extreme carelessness in disregard of such knowledge of probable falsity. Here, too, the evidence must show one kind of knowledge or the other with a high degree of certainty. If our fondest dreams are realized, the Court will require the plaintiff to produce the required admissible evidence to prove the guts of his case in each instance. Presumably the present state of counsel's file will not permit them to do this and presumably also there is not available any large fund with which to pay for the investigatory efforts necessary to produce such ~~efforts.~~ evidence. Thus, hopefully, when the time comes when Gilligan is required to produce his evidence, he will not be able to do so and dismissal as to Farmer and CORE will follow. It is all pretty iffy, but there is at least reason at this point for some subdued optimism.

Expenses incurred in connection with preparation of the reply brief were as follows:

Bradley R. Brewer (mainly cab fares)	$ 9.00
Mary Lodva (7-1/2 hours of over-time typing plus incidental expenses)	45.00
Total	$56.00

After my singular success in the Port Authority Bus Terminal Case, which, to my great surprise, made the front page of the New York Times last Saturday, I am inclined to perhaps be a bit euphoric and possibly overly optimistic. All we can do now in this case is to hurry up and wait. Having gotten all of the 19 picketers in the Port Authority Bus Terminal off completely with no records and having also obtained a decision which opens up not only all terminal facilities, but also other lobbies and privately owned plazas to leafleting, card tables, placard carrying and similar activities, it would be very nice at this point to make new law in this State implementing the New York Times case by establishing clearly that the plaintiff must demonstrate at the out-set that he has a very strong case or he gets thrown out at the very beginning. If we can win for Farmer, we will have moved the law under the First Amendment a couple of pretty good notches forward during the last few years. I haven't the foggiest notion where we go from here.

Cordially,

Brad

Bradley R. Brewer

BRB:ml

Marv, Make out check for total to me, or separate checks, whichever is easiest.

BRB

Gilligan

March 13, 1968

Bradley R. Brewer, Esq.
866 Third Avenue
New York, N.Y. 10022

Dear Bradley:

Enclosed is the check for incidental expenses on Gilligan v. Farmer.

Carl indicated that you did very well in the oral arguments and I believe that he agrees with you on your reasoning about the ultimate outcome. We all recognize that this is in the lap of the Gods.

I am most grateful to you once again.

Codially,

Marvin Rich
Executive Director

Enclosure as stated
check #2733

Carl Rachlin

MSS SEDFRE Gilligan, Thomas R. vs Farmer, James; C.O.R.E., et al.
546
Legal Papers

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Folder 3

State Historical Society of Wisconsin

Please Retain Original Order

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THOMAS R. GILLIGAN,

Respondent,

- against -

MARTIN LUTHER KING, JR.
CONGRESS OF RACIAL EQUALITY, a/k/a CORE,
JESSIE GRAY, WILLIAM EPTON, MICHAEL
CRENOVICK, TRI-LINE OFFSET CO., INC.,
PROGRESSIVE LABOR MOVEMENT and HARLEM
DEFENSE COUNCIL,

Appellants.

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Index No.

PLEASE TAKE NOTICE THAT, upon the annexed affidavit of ALAN LATMAN, sworn to November 22, 1967, and upon all the proceedings heretofore had herein, the New York Civil Liberties Union will move this Court at a Stated Term Thereof, appointed to be held in the Courthouse of the Appellate Division, First Department, Madison Avenue and 25th Street, New York, New York, on December 1, 1967, at the opening of court on that day, or as soon thereafter as counsel can be heard, for leave to file a brief as *amicus curiae* herein.

COWAN, LIEBOWITZ & LATMAN
Attorneys for New York Civil
Liberties Union
Office & P. O. Address
200 East 42nd Street
New York, N. Y. 10017
YU 6-6272

TO:

SAXE, BACON & BOLAN, ESQS.
Attorneys for Plaintiff-Respondent
598 Madison Avenue
New York, New York

SHIRLEY FINGERHOOD, ESQ.
Attorney for Defendant-Appellant, EPTON
1270 Avenue of the Americas
New York, New York

CARL RACHLIN, ESQ.
Attorney for Defendant-Appellants
FARMER and CORE
180 Park Row
New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THOMAS R. GILLIGAN, Respondent, - against - MARTIN LUTHER KING, JR., JAMES FARMER, CONGRESS OF RACIAL EQUALITY, a/k/a "CORE," JESSIE GRAY, WILLIAM EPTON, MICHAEL CRENOVICK, TRI-LINE OFFSET CO., INC., PROGRESSIVE LABOR MOVEMENT and HARLEM DEFENSE COUNCIL, Appellants.	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE Index No.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALAN LATMAN, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and a member of the firm of COWAN, LIEBOWITZ & LATMAN, which firm is acting as counsel for the New York Civil Liberties Union in this matter.

2. The New York Civil Liberties Union, the New York State affiliate of the American Civil Liberties Union, is a non-partisan organization devoted solely to protecting the individual rights and liberties guaranteed in the State and Federal constitutions.

3. The Union believes this appeal raises important questions involving the right of free speech, more particularly in its interrelation with the law of libel, as applied in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

WHEREFORE, your deponent respectfully requests that the New York Civil Liberties Union be granted leave to file a brief amicus curiae herein.

S/ALAN LATMAN
Alan Latman

Sworn to and subscribed before
me this 22nd day of November, 1967.

Sanford I Ruden
Notary Public

SANFORD I. RUDEN
Notary Public State of New York
No. 24-8698860
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1968

Carl Rachlin

To Be Submitted

File

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

- -x

THOMAS R. GILLIGAN, :

Plaintiff-Respondent, :

-against- :

MARTIN LUTHER KING, JR., JESSIE GRAY, :
MICHAEL CRENOVICK, TRI-LINE OFFSET CO.,
INC., PROGRESSIVE LABOR MOVEMENT and :
HARLEM DEFENSE COUNCIL,
:
Defendants,
:
-and-
:
WILLIAM EPTON, JAMES FARMER and CONGRESS
OF RACIAL EQUALITY a/k/a "CORE" :

Defendants-Appellants. :

- -x

BRIEF OF AMICUS CURIAE

COWAN, LIEBOWITZ & LATMAN
Attorneys for New York Civil
Liberties Union, Amicus Curiae
200 East 42nd Street
New York, New York 10017
YU 6-6272

Alan Latman
Alan H. Levine

Of Counsel

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT. 3

CONCLUSION. 11

TABLE OF CASES. 12

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:FIRST DEPARTMENT

---X

THOMAS R. GILLIGAN

Plaintiff-Respondent,

-against-

MARTIN LUTHER KING, JR., JESSIE GRAY,
MICHAEL CRENOVICK, TRI-LINE OFFSET CO.,
INC., PROGRESSIVE LABOR MOVEMENT and
HARLEM DEFENSE COUNCIL,

Defendants,

and

WILLIAM EPTON, JAMES FARMER and CONGRESS
OF RACIAL EQUALITY a/k/a "CORE"

Defendants-Appellants

---X

PRELIMINARY STATEMENT

A. Interest of Amicus Curiae

The New York Civil Liberties Union is the New York State affiliate of the American Civil Liberties Union, a non-partisan organization devoted solely to protecting the civil liberties guaranteed by the Constitutions of the United States and of the States. One of the fundamental objectives of the Union is to prevent impairment of the freedom of speech and press protected by the First and Fourteenth Amendments of the United States Constitution and by Article I, Section 8 of the New York Constitution. The Union has for many years endeavored to help clarify and define these constitutional guarantees through various activities, including participation as amicus curiae in relevant litigation.

B. The Appeals

Defendant-appellant Epton appeals from denial of his motion to dismiss by Mr. Justice Helman (Epton R.5, 43-55)*. Defendants-appellants Farmer and Congress of Racial Equality, Inc. ("Core") appeal from the denial of their similar motions by Mr. Justice Brust, who denied the motion "in view of the recent decision of Mr. Justice Helman, dated October 27, 1965, and for the reasons stated therein, which upheld the sufficiency of the complaint." (Farmer R.5)*

All three defendants-appellants, together with the other named defendants, are charged by plaintiff with libel arising from the publication of a poster containing plaintiff's photograph and name, captioned by the words "Wanted for Murder." This poster was circulated shortly after the shooting and killing by plaintiff, a police lieutenant, of a fifteen year old Negro boy. The circumstances surrounding this killing were the subject of differing accounts by witnesses, but investigations by a Grand Jury and the Police Department resulted in no action being taken against plaintiff.

---

*Record in Epton Appeal will be referred to as "Epton R.-"and record in Farmer and CORE Appeal as "Farmer R.- ."

There was concededly "great public interest" in the case. (Epton R. 23).

C. Issue to be Discussed by Amicus

The Union believes these appeals raise important questions involving the right of free speech in its interrelation with the law of libel. In an attempt to assist the Court, the Union will focus on a single issue: Does New York Times Co. v. Sullivan, 376 U.S. 254 (1964) permit the lower court on the present record to require defendants to undergo a trial? The Union believes that this question must be answered in the negative and that the orders appealed from should be reversed.

ARGUMENT

The pivot of Mr. Justice Helman's denial of defendant-appellant Epton's motion to dismiss is the conclusion that "the issue of actual malice herein should be determined at the trial" (Epton R. 40). This conclusion presumably proceeds from a proviso attached by the United States Supreme Court to its rule in New York Times v. Sullivan governing recovery for defamatory falsehood relating to official conduct. The Court prohibited such recovery by a public official "unless he proves that the statement was made with 'actual malice'...", 376 U.S. 254, 279-280 (1964). [Emphasis added]

The present appeals raise the question as to *when* a plaintiff must come forward with proof of actual malice. It is submitted that such proof, concrete and detailed, should be required on motions for judgment, such as those here involved, before a critic of official misconduct is required to undergo the burdens and expense of a trial.

The court below apparently read the *New York Times* provision as virtually suggesting that a trial is automatically required whenever the issue of actual malice is tendered by the plaintiff. In neither *New York Times* itself nor the half-dozen Supreme Court decisions in its wake,* is there a basis for any such suggestion. Moreover, the rationale of these authorities is avoidance of restraints on criticism of public officials. This requires the imposition of a heavy burden on a public official before he can negate the constitutional privilege of criticism. Plaintiff has not even approached meeting this burden here.

The *New York Times* rule seeks to promote "uninhibited, robust and wide-open" debate on public issues, 376 U.S. at 270.

**Garrison v. Louisiana*, 379 U.S. 64 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967); *Time Inc. v. Hill*, 385 U.S. 374 (1967).

Enthusiasm for this type of debate can be dampened in many ways. Most direct is prior restraint by a state, in the guise of regulation, of First Amendment freedoms. The Supreme Court has struck down a number of such attempts regardless of the novelty of the form of restraint. See, e.g., NAACP v. Button, 371 U.S. 415 (1963) (regulation of solicitation of legal business); Freedman v. Maryland, 380 U.S. 51 (1965) (licensing of motion pictures); Lovell v. City of Griffin, Ga., 303 U.S. 444 (1938) (permission for distributing literature); Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1963) (disclosure of group affiliation).

Less direct, but equally objectionable, is the use of criminal sanctions, such as provided in the infamous Sedition Act of 1798, 1 Stat. 596, and a number of state laws. With respect to the Sedition Act, "the attack upon its validity has carried the day in the court of history" New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964). And the Supreme Court had little difficulty in applying the restrictions of New York Times to state criminal libel statutes. Garrison v. Louisiana, 379 U.S. 64 (1964).

The New York Times case itself considered a potential inhibition on free speech which, on the surface, is still more indirect, namely, the threat of civil liability. It has long been acknowledged that civil injunctive relief is generally unavailable against defamation. See, e.g.

Goldstein v. Simon & Shuster, N.Y.L.J. Jan. 13, 1965, p. 15, col. 2 (Hofstadter, J.) The court, in New York Times, closely examined the effect of civil liability for damages upon criticism of official conduct and noted that "the fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." 376 U.S. at 277. The Court had earlier noted in NAACP v. Button, 371 U.S. 415, 433 (1963) that "the threat of sanctions may deter their [First Amendment freedoms] exercise almost as potently as the actual application of sanctions."

The foregoing line of authorities reflects concern for the unique quality of freedom of speech. Deterrents on the exercise of this freedom may be more subtle and insidious than any other. Restraints can result in unconscious orthodoxy of views, as critics refrain from even approaching the prohibited area. See Speiser v. Randall, 357 U.S. 513, 526 (1958). Moreover, a public interest protects the listener, reader or viewer, as well as the disseminator of criticism. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). These are the considerations that have led to the constitutional requirement that truth be a defense where public affairs are concerned. See Garrison v. Louisiana, 379 U.S. 64, 74 (1964). But in insulating from liability even falsehoods (if non-malicious), the Court in New York Times sought to give the freedoms of expression "the 'breathing space' that they 'need...to survive.'" 376 U.S. at 272.

It is precisely the need for "breathing space" that requires dismissal of this action upon the present record. It is not merely the threat of the imposition of criminal or civil sanctions that subtly mutes criticism. The spectre of a burdensome trial to vindicate constitutional privilege has an equally "chilling effect."

In Time, Inc. v. Hill, the Supreme Court relied on similar considerations in formulating constitutional limitations on the right of privacy. The Court noted "the intolerable burden of guessing how a jury might assess" the negligence standard for news reporting there rejected, as well as the "fear of the expense involved" in the defense of lawsuits. In his separate opinion, Mr. Justice Harlan went even further, noting the risk of censorship created by putting subjective issues "to the pre-existing prejudices of a jury." 385 U.S. at 406.

It is, of course, not suggested that the issue of actual malice left open by New York Times may never be tried. It is rather submitted that the burdens of trial should be imposed only after the plaintff makes a sufficient showing of such malice, when put to his proof on a motion for judgment. The sufficiency of such a showing must be weighed in the context of the strong constitutional considerations discussed above.

Plaintiff's skimpy affidavits hardly meet this constitutional standard. Plaintff fails to controvert any of the facts respectively set forth to negate actual malice in the affidavits of the defendant-appellant Epton (Epton R. 8-14) and the defendant-appellant Farmer (Farmer R. 16). In the Farmer appeal, plaintiff is completely silent on this crucial point. In Epton, he merely offers a sketchy outline of the circumstances surrounding his publicized killing of a fifteen-year-old boy, cites the results of Grand Jury and Police Review Board investigations and concludes that defendants' use of the words "Wanted for Murder" with reference to him "were published by defendants with reason to believe that they were false and with actual malice towards me..." (Epton R. 41-42).

This precise issue was considered by the Court of Appeals for the District of Columbia in Washington Post Company v. Keogh, 365 F. 2d 965 (D.C. Cir. 1965), cert. denied, 385 U.S. 1011 (1967). In this action for defamation arising from criticism of a Congressman's conduct, the District Court had denied defendants' Motion for Summary Judgment which had been based on the New York Times rule. In reversing, Judge Wright made the following pertinent remarks:

> "Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harrass or to coerce a settlement. [Citation omitted]
>
> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harrassment succeeds, is free debate. . . The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes."

365 F. 2d at 968.

Accordingly, summary judgment has been granted in vindication of constitutional rights in a variety of contexts. See e. g., Wilson v. City of Paducah, later stage reported at 100 F. Supp. 116 (W.D. Ky. 1951) (college admission for Negroes); Paramount Film Distributing Corp. v. City of Chicago, 172 F. Supp. 69 (N.D. Ill. 1959) (licensing of motion pictures).

In Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966), a libel complaint was dismissed on summary judgment. In affirming, the Court of Appeals for the Fifth Circuit stated as follows:

> "Appellant nevertheless contends vigorously that she was entitled to take her case to the jury, that the District Court erred

> in granting defendants' motion for summary judgment. Apparently she assumes that the filing of counter-affidavits makes it a jury case. But, this is not enough . . ."

358 F.2d at 354. Accord: Preble v. Johnson, 275 F.2d 275, 279 (10th Cir. 1960).

Another factor, noted in the opinion below, supports dismissal here. In determining that plaintiff was a "public official" within the New York Times rule, Mr. Justice Helman relied upon the Supreme Court's finding that a citizen critizing an official is entitled to a "fair equivalent of the immunity granted" to the official for statements made by him (Epton R. 52). In Barr v. Matteo, 360 U.S. 564 (1959), the Supreme Court had held that government officials have an absolute privilege. The rationale of this rule, quoted in Barr, was well expressed by Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949),as follows:

> ". . . it is impossible to know whether the claim is well founded until the case has been tried, and that to submit officials, the innocent as well as the guilty to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of the most resolute, or the most irresponsible, in the discharge of their duties."

The ardor of an individual citizen to speak freely may be more easily dampened than that of a public official. Moreover, as aptly noted by Judge Wright in Washington Post Company v. Keogh, "All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits." 365 F.2d at 968.

The foregoing approach is consistent with the precedents in the Courts of the State of New York. See, e.g., Ashcroft v. Hammond, 197 N.Y. 488, 495 (1910). (Actual malice question for jury only where evidence warrants submission). In Shapiro v. Health Insurance Plan, 7 N.Y. 2d 56 (1959) the Court of Appeals reversed a denial of summary judgment, finding that plaintiff's answering papers contained "suspicion, surmise and accusations rather than facts proving actual malice." In the present case, as in Shapiro, there is nothing in the answering affidavits "beyond plaintiff's say-so." 7 N.Y. 2d at 63.

The authorities relied upon by Mr. Justice Helman seem to suggest the sufficiency of falsity as a basis for defamation against public officials; this is, of course, the very position rejected by New York Times. See Note, 95 ALR 2d 1450, 1453 (1964).

CONCLUSION

In view of the foregoing, it is the position of the Union that the orders below should be reversed and the complaint dismissed.

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN
Attorneys for New York Civil
Liberties Union, Amicus
Curiae
200 East 42nd Street
New York, New York 10017
YU 6-6272

Alan Latman
Alan H. Levine
Of Counsel

TABLE OF CASES

Ashcroft v. Hammond, 197 N.Y. 488, 495 (1910). 11

Barr v. Matteo, 360 U.S. 564 (1959). 10

Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966). 9

Freedman v. Maryland, 380 U.S. 51 (1965) 5

Garrison v. Louisiana, 379 U.S. 64 (1964). 5, 6

Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1963). 5

Goldstein v. Simon & Shuster, NYL.J. Jan. 13, 1965, p. 15, Col. 2 (Hofstadter J.). 6

Gregorie v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) 10

Lovell v. City of Griffin, Ga., 303 U.S. 444 (1938). 5

NAACP v. Button, 371 U.S. 415 (1963) 5

New York Times Co. v. Sullivan, 376 U.S. 254 (1964). .3, 4, 5, 6, 7, 8, 10, 11

Paramount Film Distributing Corp. v. City of Chicago, 172 F.Supp. 69 (N.D. Ill. 1959) 9

Preble v. Johnson, 275 F.2d 275, 279 (10th Cir. 1960). 10

Shapiro v. Health Insurance Plan, 7 N.Y. 2d 56 (1959). 11

Speiser v. Randall, 357 U.S. 513, 526 (1958) 6

Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) 6, 7

Virgo Corp. v. Paiewonsky, 251 F.Supp. 279 (D.V.I. 1966) 9

Washington Post Company v. Keogh, 365 F.2d 965 (D.C. Cir. 1965).8,10

Wilson v. City of Paducah, 100 F.Supp. 116 (W.D. Ky. 1951) . . . 9

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

THOMAS R. GILLIGAN

Plaintiff-Respondent

-against-

JAMES FARMER AND CONGRESS OF RACIAL EQUALITY, INC., also known as "CORE",

Defendants-Appellants.

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

MARY LODVA, being duly sworn, deposes and says that she is not a party to this action, is over the age of 18, and resides at 350 Cabrini Boulevard, New York, New York 10040.

ML [illegible] On ~~the 5th day~~ or before the 29th of December, 1967, your deponent served 3 copies of the within (and above entitled) Brief and Record on Appeal upon Saxe, Bacon & Bolan, attorneys for the ML [illegible] plaintiff-respondent in this action, at 598 Madison Avenue, New York, New York 10022 the address designated by said attorneys for the purposes of depositing true copies of the same enclosure in a post paid, properly addressed wrapper, located at 866 Third Avenue, New York, New York 10022, an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Mary Lodva
Mary Lodva

Sworn to before me this 6th day of
December, 1967

Michael J. Ducey

MICHAEL J. DUCEY
NOTARY PUBLIC, State of New York
No. 41-6110300
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1968

Calendar No.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

- -x

THOMAS R. GILLIGAN,

Plaintiff-Respondent

-against-

JAMES FARMER AND CONGRESS OF RACIAL EQUALITY a/k/a
"Core"

Defendants-Appellants,

-and-

MARTIN LUTHER KING, JR., JESSIE GRAY, WILLIAM
EPTON, MICHAEL CRENOVICK, TRI-LINE OFFSET CO., INC.,
PROGRESSIVE LABOR MOVEMENT AND HARLEM DEFENSE COUNCIL,

Defendants.

- -x

BRIEF OF DEFENDANTS - APPELLANTS - JAMES FARMER AND CONGRESS OF RACIAL EQUALITY

BRADLEY R. BREWER
866 Third Avenue
New York, New York 10022

EUGENE G. EISNER
13 Astor Place
New York, New York 10003

CARL A. RACHLIN
150 Nassau Street
New York, New York 10038

Attorneys for Defendants-Appellants

Of counsel:

DENISON RAY
STEPHEN NAGLER

TABLE OF CONTENTS

Questions Presented 1

Procedural Statement 3

Statement of the Case 4

Argument:

I. IT WAS EITHER REVERSIBLE ERROR UNDER STATE LAW OR A VIOLATION OF DUE PROCESS UNDER THE FEDERAL CONSTITUTION FOR THE COURT BELOW TO DISMISS DEFENDANT'S MOTION WITHOUT REFERENCE TO ANY ARGUMENT MADE IN SUPPORT OF THAT MOTION AND BY RELYING EXCLUSIVELY UPON A DECISION IN A RELATED BUT MATERIALLY DIFFERENT CASE INVOLVING A DIFFERENT COMPLAINT, SUBSTANTIALLY DIFFERENT FACTS, AND COMPLETELY DIFFERENT ISSUES. THE ISSUES BEFORE THE COURT BELOW RELATED BASICALLY TO STATE LAW, WHEREAS THE BASIC ISSUES IN THE OTHER CASE AROSE EXCLUSIVELY UNDER THE FEDERAL CONSTITUTION. . . . 9

II. PLAINTIFF HAS NOT SHOWN THAT HE HAS AVAILABLE EITHER (A) A MINIMAL AMOUNT OF ADMISSIBLE EVIDENCE WITH WHICH TO CREATE A JUSTICIABLE ISSUE IN THIS CASE OR (B) A SIGNIFICANT POSSIBILITY OF OBTAINING SUCH EVIDENCE. 11

(a) Plaintiff has not shown that he has or may obtain any evidence with which to establish any connection between the distribution of the allegedly libelous poster in this case and either a local, autonomous CORE chapter or the separate and distinct National CORE organization which is a defendant in this case. 11

(b) The plaintiff has not indicated on the record that he has even a shred of evidence or the remotest possibility of obtaining any evidence with which to establish any connection whatever between the defendant James Farmer and distribution of the allegedly libelous poster involved in this case 14

III. PLAINTIFF HAS NOT SHOWN ON THE RECORD THAT HE HAS OR HAS ANY SIGNIFICANT POSSIBILITY OF OBTAINING ANY EVIDENCE TO INDICATE THE EXISTENCE OF AN AGREEMENT OR, INDEED, ANY COMMUNICATION BETWEEN OR AMONG ANY OF THE INDIVIDUAL DEFENDANTS OR REPRESENTATIVES (OTHER THAN THE INDIVIDUAL DEFENDANTS) OF THE DEFENDANT ORGANIZATIONS. 16

IV. BECAUSE THE OBLIGATIONS OF A POLICE OFFICER INCLUDE THE DUTY TO CARRY A REVOLVER AND THEREFORE INVOLVE THE RISK THAT HE MAY BE CALLED UPON BY CIRCUMSTANCES TO SHOOT AND POSSIBLY KILL SOMEONE IN THE LINE OF DUTY, IT IS REASONABLY TO BE EXPECTED AND THERFORE ONE OF THE ASSUMED RISKS OF A POLICE OFFICER'S OCCUPATION THAT SOME PERSON RELATED TO OR FOR SOME OTHER REASON CONCERNED ABOUT THE PERSON KILLED MAY CALL THE OFFICER A MURDERER. THE ASSUMPTION OF SUCH RISK AS PART OF HIS JOB PRECLUDES A POLICE OFFICER AS A MATTER OF LAW FROM PROSECUTING A DEFAMATION ACTION WHERE SUCH AN ACCUSATION IS MADE AS THE RESULT OF AN INCIDENT IN WHICH HE SHOOTS AND KILLS SOMEONE. 18

V. THERE IS A DISTINCTION (FOR PURPOSES OF THE POLICY WHICH UNDERLIES THE LAW OF DEFAMATION IN NEW YORK STATE) BETWEEN (A) A SITUATION IN WHICH A PLAINTIFF IS, WITHOUT JUSTIFICATION, ACCUSED BY THE DEFENDANT OF BEING INVOLVED IN A CRIME ARISING OUT OF CIRCUMSTANCES IN WHICH THE PLAINTIFF WAS ABSOLUTELY NOT INVOLVED IN ANY WAY AND WOULD NOT HAVE BEEN SUBJECT TO ANY PUBLIC CRITICISM BUT FOR THE STATEMENT MADE BY THE DEFENDANT, AND (B) THE COMPLETELY DIFFERENT SITUATION IN WHICH THE PLAINTIFF WAS ADMITTEDLY INVOLVED IN AMBIGUOUS FACTUAL CIRCUMSTANCES WHICH GAVE RISE, UNAVOIDABLY, TO PUBLIC DEBATE AS TO WHETHER OR NOT HE HAD COMMITTED A CRIME, WHICH INEVITABLY SUBJECTED HIM TO A GREAT AMOUNT OF PUBLIC ATTENTION AND CRITICISM AND IN WHICH THE DEFENDANT SIMPLY EXPRESSED ONE OF A NUMBER OF DIFFERENT INTERPRETATIONS BEING CONSTANTLY AND VOLUMINOUSLY EXCHANGED IN PRIVATE CONVERSATIONS AND IN THE PUBLIC MEDIA. NEW YORK TIMES V. SULLIVAN AND THE FUNDAMENTAL POLICY UNDERLYING THE FIRST AMENDMENT REQUIRE THAT SUCH A DISTINCTION BE DRAWN EITHER AS A MATTER OF THE NEW YORK LAW OF DEFAMATION OR AS A MATTER OF FEDERAL CONSTITUTIONAL LAW UNDER THE FIRST AMENDMENT. THAT DISTINCTION REQUIRES DISMISSAL OF A COMPLAINT WHICH FALLS SQUARELY WITHIN THE SECOND CATEGORY 22

Conclusion 26

QUESTIONS PRESENTED

(1) Was it reversible error under state law or a violation of due process under the Federal Constitution for the Court below to dismiss defendant's motion without any refernce to any argument made in support of that motion and by relying upon the decision of Mr. Justice Helman in a related case involving a different complaint, substantially different facts, and completely different issues?

(2) Has the plaintiff shown that he has available either (i) a minimal amount of admissible evidence with which to create a justiciable issue or (ii) a significant possibility of obtaining such evidence?

> (a) Has the plaintiff shown that he has or may obtain evidence with which to establish any connection between the distribution of the allegedly libelous poster in this case and either a local, autonomous CORE chapter or the separate and distinct National CORE organization?
>
> (b) Has the plaintiff indicated that he has even a shred of evidence or the remotest possibility of obtaining evidence with which to establish any connection whatever between the defendant James Farmer and distribution of the allegedly libelous poster involved in this case?

(3) Has the plaintiff shown that he has (or has any significant possibility of obtaining) any evidence to indicate the existence of an agreement or, indeed, any communication between or among any of the individual defendants or representatives (other than the individual defendants) of any of the defendant organizations?

(4) Because the obligations of a police officer include the duty to carry a revolver and therefore involve the risk that he may be called upon by circumstances to shoot and possibly kill someone in the line of duty, is it reasonably to be expected and therefore one

of the assumed risks of a police officer's occupation that some person related to, or for some reason concerned about, the person killed, may call the officer a murderer? If it is, does the assumption of such risk as a part of his job preclude the officer as a matter of law from prosecuting a defamation action where such an accusation is made as the result of his shooting and killing someone?

(5) Is there a distinction (for purposes of the policy which underlies the law of defamation in New York State) between (a) a situation in which a plaintiff is, without justification, accused by the defendant of being involved in a crime arising out of circumstances in which the plaintiff was absolutely not involved in any way and would not have been subject to any public criticism but for the statement made by the defendant, and (b) the completely different situation in which the plaintiff is admittedly involved in ambiguous factual circumstances which give rise, unavoidably, to public debate as to whether or not he has committed a crime, which inevitably subject him to a great amount of public attention and criticism, and in which the defendant simply expresses one of a number of different interpretations being constantly and voluminously exchanged in private conversations and in the public news media? Do New York Times v. Sullivan and the fundamental policy underlying the First Amendment require that such a distinction be drawn either as a matter of the New York Law of defamation or as a matter of Federal Constitutional Law under the First Amendment? If the policy behind the law of defamation does create such a distinction, does it also require dismissal of a complaint which falls squarely within the second category?

PROCEDURAL STATEMENT

This is an appeal from an order below of the Supreme Court, Special Term, Part I, Mr. Justice Joseph A. Brust presiding, issued on October 29, 1965, and entered in the office of the Clerk of the County of New York on November 1, 1965, denying defendants' motion to dismiss the complaint herein pursuant to Rule 3211(a)(7) and (c) of the CPLR. Defendants-appellants James Farmer and Congress of Racial Equality ("CORE") appeal from each part of said order and from the whole thereof.

Plaintiff, Thomas R. Gilligan, commenced this libel action by service of summons and verified complaint on May 25, 1965. The named defendants are: William Epton, Jessie Gray, Martin Luther King, Jr., Michael Crenovick, James Farmer, Congress of Racial Equality, Inc. ("CORE"), Tri-Line Offset Co., Inc., Progressive Labor Movement, and Harlem Defense Council. Defendants Farmer and CORE moved before the Court below for dismissal of the complaint against them with prejudice. On November 1, 1965, the Court below, Mr. Justice Joseph A. Brust presiding, denied that motion.

STATEMENT OF THE CASE

Plaintiff is a police lieutenant in the Police Department of the City of New York. On July 16, 1964, at approximately 9:30 a.m., he was in a television repair shop across the street from Wagner Junior High School on East 76th Street in Manhattan. He was off duty and in civilian clothes.

There was a disturbance on the street outside to which the plaintiff responded. The sequence of events which followed has not been, and probably never will be, accurately or satisfactorily reconstructed. All that is known with certainty is that plaintiff shot and killed a fifteen year old Negro student at Wagner Junior High School named James Powell. It was summer in New York City and there had been apprehension for some time on the part of City officials and of Negro leaders of various persuasions that serious disturbances might arise if the necessary incendiary incident were to occur.

The killing of Powell generated a great amount of agitation and hostility in Harlem, where Powell lived, and in the other Negro communities of New York City. It also became a major news story on all media, including newspapers, radio and television. Various organizations, including the office of the District Attorney for New York County, investigated the matter and reported on it.

The public debate and discussion focused upon the question of whether or not the killing of Powell had been justified or was, on the other hand, without justification and therefore a crime, possibly murder. Plaintiff Gilligan maintained that Powell had attacked him with a knife.

Statements made by witnesses to the killing caused some persons to believe either that Powell did not have a knife at all or that, if he had a knife, he was not brandishing it and did not attack Gilligan with it. The killing of Powell triggered a widespread debate in the press and communications media and also among many private citizens. Much heated argument and discussion resulted. Emotions were particularly aroused in Harlem. On or about July 18, 1964, a poster was distributed in Harlem which contained a picture of the plaintiff above which was printed the statement "WANTED FOR MURDER" and below were the words "GILLIGAN THE COP" and "LIEUT. THOMAS GILLIGAN OF THE 14th DIVISION." (R-13) At the bottom of the page was printed "Harlem Defense Council" together with the address and telephone number of that organization.

The only attempt by the plaintiff in the record to connect defendants James Farmer and Congress of Racial Equality with distribution of that poster is contained in the affidavit of plaintiff Thomas R. Gilligan (R-20) and in a derivative statement by his attorney Frank S. Polestino. (R-23) Paragraph 6 of plaintiff's affidavit states as follows:

> "6. My assertion that the defendant James Farmer and the Congress of Racial Equality, Inc. were a part of the conspiracy is based on the fact that when various news media interviewed persons carrying the placards, or distributing the handbill containing a photograph of me in my police uniform and the words "WANTED FOR MURDER", many of these persons indicated that they were acting as members of the Congress of Racial Equality, Inc."

On their face those statements show quite clearly that plaintiff is not in possession of any admissible evidence with which to establish any connection between defendant James Farmer and distribution of the poster in question nor, indeed, does he have any facts at all (admissible or not) with which to establish such a connection or any facts which would even suggest that he might be able at some future time to discover admissible evidence. Furthermore, those statements do not indicate any connection between defendant Congress of Racial Equality, Inc. and distribution of the poster. There is not and was not at the time in question such a thing as a membership in the national organization Congress of Racial Equality, Inc. A CORE member is a member of an autonomous local chapter which is permitted by virtue of a loose affiliation understanding to use the name Congress of Racial Equality. The corporation itself does not have members, but has only officers, directors, and employees. Therefore, if the statement of the plaintiff indicates anything at all, it indicates at most that some of the persons distributing the poster said they were members of CORE, meaning that they may have belonged to a local CORE chapter. Since members of local chapters were not in any way authorized to act on behalf of the national organization, there is absolutely no reason to believe that the statements adverted to by plaintiff establish the connection for which they are cited. A member of a local CORE chapter has no more authority to act for or "represent" the national organization than a member of a local Democratic or Republican political club has to "represent" his national party organization.

Moreover, it appears quite clear from the statement of plaintiff on the record that he does not know the identity of the alleged poster distributors who are purported to have stated their membership in CORE. It is also extremely doubtful that they actually stated that they were members of The Congress of Racial Equality, Inc. by its full corporate name. Membership in CORE is quite a different thing. Thus plaintiff has not given to the Court below or to this Court any indication that he has or that he can obtain any admissible evidence with which to establish the necessary connection. It is quite clear also from the affidavit of defendant James Farmer (R-14) that plaintiff cannot establish the existence of authority on the part of local CORE chapter members to represent or act on behalf of the national organization named a defendant in this case.

Defendant James Farmer, who was when the facts of this case arose and when he made his affidavit (R-14) National Director (or chief executive officer) of The Congress of Racial Equality, Inc. ("CORE"), has stated both on his own behalf and on behalf of CORE that neither he nor any other officer or employee of CORE ever conspired with any of the other defendants or participated in any plan or course of action to defame or otherwise harm plaintiff. He has also stated under oath unequivocally that neither he nor CORE had anything whatever to do with the preparation or the publication of the poster in question. He has in fact categorically denied for himself and for CORE any knowledge of the poster prior to its distribution, and the record contains absolutely nothing to contradict or weaken those denials.

There is nothing in the record which in any way draws into question in any way Mr. Farmer's categorical denial on his own behalf and on behalf of CORE of every material allegation of the complaint. Nor is there anything in the record to indicate that defendant has any evidence with which to connect either Farmer or CORE with this case, that he has any facts (admissible or not) which indicate any such connection, or that he has any significant likelihood of being able in any way to obtain any such evidence. In such circumstances, the record is quite clearly devoid of anything of substance which would have justified the Court below or which would justify this Court in concluding that any justiciable issue exists or can be established by the plaintiff with respect to defendants Farmer and CORE.

POINT ONE

IT WAS EITHER REVERSIBLE ERROR UNDER STATE LAW OR A VIOLATION OF DUE PROCESS UNDER THE FEDERAL CONSTITUTION FOR THE COURT BELOW TO DISMISS DEFENDANT'S MOTION WITHOUT REFERENCE TO ANY ARGUMENT MADE IN SUPPORT OF THAT MOTION AND BY RELYING EXCLUSIVELY UPON A DECISION IN A RELATED BUT MATERIALLY DIFFERENT CASE INVOLVING A DIFFERENT COMPLAINT, SUBSTANTIALLY DIFFERENT FACTS, AND COMPLETELY DIFFERENT ISSUES. THE ISSUES BEFORE THE COURT BELOW RELATED BASICALLY TO STATE LAW, WHEREAS THE BASIC ISSUES IN THE OTHER CASE AROSE EXCLUSIVELY UNDER THE FEDERAL CONSTITUTION.

In the present case, the main issues presented to the court below were questions of state law which went to the matter of whether or not plaintiff had stated a cause of action recognized by the jurisprudence of this State. The court below dismissed the motion of defendants Farmer and CORE for dismissal of the action by relying as the sole basis for denial of the motion upon the opinion of Mr. Justice Helman in a related case, involving different facts, a different complaint, different issues and completely different arguments. The issues and arguments before Mr. Justice Helman related primarily to federal constitutional law and centered upon the extent of the privilege of fair comment provided by the holding of New York Times Co. v. Sullivan. Completely different arguments were presented to the court below based upon different facts and upon different legal authorities.

Since we must assume that the court below read the record and brief submitted to it, we are forced to the conclusion that it simply made a mistake amounting to reversible error when it assumed that the reasoning of Mr. Justice Helman in the other case constituted sufficient response to the arguments presented in this case to satisfy the requirements of the law of this State and to satisfy the fundamental requirements of due process of law under the Federal Constitution which requires a fair hearing and some measure of judicial consideration and reasoning on the issues presented.

We submit that if the denial of the instant motion to dismiss is allowed to stand on the present record, serious constitutional questions will arise with respect to the process by which the court below arrived at its decision. For that reason we submit that this case must be reversed with instructions to the court below to consider and to render an opinion upon the issues presented in the briefs of the parties and in the record of this case.

POINT TWO

PLAINTIFF HAS NOT SHOWN THAT HE HAS AVAILABLE EITHER (A) A MINIMAL AMOUNT OF ADMISSIBLE EVIDENCE WITH WHICH TO CREATE A JUSTICIABLE ISSUE IN THIS CASE OR (B) A SIGNIFICANT POSSIBILITY OF OBTAINING SUCH EVIDENCE.

(a) Plaintiff has not shown that he has or may obtain any evidence with which to establish any connection between the distribution of the allegedly libelous poster in this case and either a local, autonomous CORE chapter or the separate and distinct National CORE organization which is a defendant in this case.

It is fundamental law in this State that in order to withstand a motion for dismissal or summary judgment, plaintiff must have at least some evidence, some significant substance to his case, with which to indicate that his case is not totally lacking in evidentiary substance, highly unlikely to produce a justiciable issue, and therefore unworthy of further effort on the part of the court and of counsel.* In this case plaintiff has not shown any indication that he has or that he has any significant likelihood of obtaining any evidence with which to establish any connection between distribution of the poster involved and either a local, autonomous CORE chapter or the separate and distinct National CORE organization which is a defendant in this case.

All the plaintiff has produced is a statement in an affidavit by him, based upon information and belief without further specification, that some people who distributed the poster said they were members of CORE. He has not indicated that he knows who those people were or that he can find out who they were. He does not indicate why the participation of a member of a local CORE chapter in the distribution of the poster necessarily implicates either a local CORE chapter or the national organization which is named a defendant in this case. Membership in CORE does not imply representation of that organization for purposes of vicarious liability any more than membership in a local Democratic political club, and announcement of same, indicates that actions taken by the member constitute actions of the organization. The connection is an extremely difficult one to establish, and plaintiff has not provided even the slightest indication that he has even a remote possibility of being able to establish it.

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* Chiapinella-Marx, Inc. v. Pacitto, 46 Misc.2d 611, 260 N.Y.S.2d 355,357 (Sup. Ct., Westchester Co., 1965, Supple, J.) (Motion to dismiss defamation action granted.) "[T] the defendant having shown the public nature of the report, the burden of showing lack of good faith, i.e., malice is upon the plaintiff, and if the evidence produced by plaintiff on this motion would not warrant submission of the issue of malice to the jury, the motion should be granted." (Emphasis supplied.) Accord Keogh v. New York Herald Tribune, Inc., 51 Misc.2d 888, 274 N.Y.S.2d 302 Sup . Ct. N.Y. Co., 1966, Gellinoff, J.) (Ct. held that sufficient evidence had been presented to create a jury question on actual malice.)

It is perfectly clear from the record in this case that the plaintiff has provided absolutely nothing of substance with which to connect the defendant Congress of Racial Equality with the allegedly defamatory publication in-involved.

It is well established in the law of this and other states that in order to withstand a motion to dismiss, plaintiff must show with "convincing clarity" that there is genuine substance to his case and that actual malice in the sense of personal ill-will exists. Henry v. Collins, U.S. , 86 Sup. Ct. 992 (1965); Gruld v. Broad, 16 N.Y.2d 666 (1965); Shapiro v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 56 (1959); Haye v. American Defense Society, 252 N.Y. 266 268 (1929); Vecino v. Martinez, 260 N.Y. Supp.2d 802 (1st Dep. 1965)(not off rep.); Graymount v. Schlemmer, 283 App. Div. 859 (1st Dep. 1954); Platt v. Rose, 208 Misc. 1 (Supp. Ct. Erie Co. 1955); Clark v. Allen, 204 A2d 42 (Pa. 1964); Holden v. Pioneer Broadcasting Co., 365 P2d 845, 854 (Ore. 1961); Pavolvsky v. Board of Trade, 340 P2d 63 (Cal. 1959); Stice v. Beacon Newspaper Corp., 340 P2d 396 (Kan. 1959); Combs v. Montgomery Ward & Co., 228 P2d 272 (Utah 1951).

With respect to defendant Congress of Racial Equality, plaintiff has clearly and unmistakably not carried the burden required by law. Therefore the court below erred in refusing to grant the motion to dismiss, and the order below must be reversed.

(b) The plaintiff has not indicated on the record that he has even a shred of evidence or the remotest possibility of obtaining any evidence with which to establish any connection whatever between the defendant James Farmer and distribtuion of the allegedly libelous poster involved in this case.

Of course the alleged admission of membership in CORE by persons distributing the poster in no way implicates defendant James Farmer in the publication or distribution of that poster. There is not one shred of evidence in this case anywhere to indicate that plaintiff has any evidence whatever or any possibility of obtaining any evidence with which to implicate or involve James Farmer in the publication of the poster in this case. Defendant Farmer has, on the record, categorically denied under oath any involvement either by him or by CORE in publication and distribution of the poster and has indeed stated in absolute terms that neither he nor anyone in any responsible capacity in CORE even knew anything about the poster in this case before its distribution.

In light of the complete absence of any evidence on the record or any indication of any association of defendant Farmer with the facts alleged in this complaint, it is impossible to justify the refusal of the court below to dismiss the action against him. So far as Farmer is concerned, the case is a complete ruse and simply represents a wild attempt on the part of the plaintiff to attach liability for the poster to Farmer. This attempt based upon bare and completely unsupported allegations in a complaint has caused a great deal of waste of time on the part of the courts of this State and on the part of counsel and it should not be further tolerated. The decision below should unquestionably be reversed and the court instructed to dismiss the action against Mr. Farmer

POINT THREE

PLAINTIFF HAS NOT SHOWN ON THE RECORD THAT HE HAS OR HAS ANY SIGNIFICANT POSSIBILITY OF OBTAINING ANY EVIDENCE TO INDICATE THE EXISTENCE OF AN AGREEMENT OR, INDEED, ANY COMMUNICATION BETWEEN OR AMONG ANY OF THE INDIVIDUAL DEFENDANTS OR REPRESENTATIVES (OTHER THAN THE INDIVIDUAL DEFENDANTS) OF THE DEFENDANT ORGANIZATIONS.

Plaintiff has elected to base his case upon allegations that there existed a conspiracy, agreement, joint policy, or similar concert of action, among the named defendants and between them and the organizations represented by them and the other defendant organizations. The complaint and the supporting affidavit of the plaintiff make perfectly clear that his causes of action are grounded in allegations of conspiracy so far as defendants James Farmer and Congress of Racial Equality are concerned.

We submit that plaintiff has not shown on the record that he has or has any significant possibility of obtaining any evidence with which to indicate the existence of an agreement or, indeed, any communication between or among any of the individual defendants or between any of them and other representatives of the defendant organizations. In the absence of any proof or any facts, or any indication as to how probative facts or evidence might be obtained, plaintiff's case amounts to nothing but bare allegations totally lacking in substance and should have been dismissed by the court below.

In order to withstand the motion to dismiss below, plaintiff had an affirmative duty to establish a colorable claim against each of the defendants. In order to do that, he had to support the material allegation of conspiracy stated in his complaint. In order to establish conspiracy, he must show some communication amounting to an agreement between each defendant and another defendant to do the injurious acts complained of. There is not one shred of evidence or one allegation of fact in the record to indicate that there ever was any communication between defendant Farmer and any other defendant or defendant organization or between any other representative of CORE and any individual defendant other than Farmer or any representative of any other defendant organization other than a named defendant.

There simply is nothing on the record to indicate any participation whatever by Farmer of CORE in any conspiracy or concert of action to defame plaintiff. Therefore, the action should have been dismissed as to Farmer and CORE, and the failure of the court below to dismiss the action was reversible error requiring reversal by this court.

POINT FOUR

BECAUSE THE OBLIGATIONS OF A POLICE OFFICER INCLUDE THE DUTY TO CARRY A REVOLVER AND THEREFORE INVOLVE THE RISK THAT HE MAY BE CALLED UPON BY CIRCUMSTANCES TO SHOOT AND POSSIBLY KILL SOMEONE INTHE LINE OF DUTY, IT IS REASONABLY TO BE EXPECTED AND THEREFORE ONE OF THE ASSUMED RISKS OF A POLICE OFFICER'S OCCUPATION THAT SOME PERSON RELATED TO OR FOR SOME OTHER REASON CONCERNED ABOUT THE PERSON KILLED MAY CALL THE OFFICER A MURDERER. THE ASSUMPTION OF SUCH RISK AS PART OF HIS JOB PRECLUDES THE POLICE OFFICER AS A MATTER OF LAW FROM PROSECUTING A DEFAMATION ACTION WHERE SUCH AN ACCUSATION IS MADE AS THE RESULT OF AN INCIDENT IN WHICH HE SHOOTS AND KILLS SOMEONE.

It is a fundamental principal of that area of the law of torts known as "assumption of risk" that one who voluntarily enters a dangerous situation or occupation with knowledge of the particular risk which subsequently results in injury or alleged injury to him is deemed as a matter of law to have assumed the known risk and is barred from recovering for his injuries. Thus, where a man voluntarily accepts employment knowing that he is expected to work with a dangerous machine or animal or ride in a defective automobile, he accepts the responsibility of the inherent dangers of the undertaking to the extent that they are known to him and undertakes, in effect, to look out for himself. Cf. La Fleur v. Vergillia, 280 App. Div. 1035, 117 NY Supp. 2d 244 (1952), a case involving assumption of risk by one who voluntarily undertook the occupation of teaching beginning drivers to operate an automobile. All jurisdictions, including New York, recognize the principal that where a person enters a situation both voluntarily and with knowledge that certain dangers are inherently involved, he is deemed to have assumed the risks of the reasonably foreseeable consequences of the dangers known to him. Where those known dangers involve foreseeable acts by other persons, the one who has assumed the risk is foreclosed from litigation against such person as a matter of law. Murphy v. Steeplechase Amusement Co., 250 N.Y. 479 (1929); Hammel v. Madison Square Garden Corp., 156 Misc. 311, 279 N.Y. Supp. 815 (1935).

The present situation falls squarely within the rule with respect to assumption of risk. In addition, the teaching of New York Times Co. v. Sullivan indicates that First Amendment considerations add an additional factor in support of the proposition that not only did Gilligan voluntarily assume the risk involved in this case, but considerations related to the necessity of free debate upon the conduct of public officials require that he have assumed them.

When Lieutenant Gilligan became a police officer seventeen years ago, he knew that the obligations of a policeman include the duty to carry a revolver at all times and therefore involve unavoidably the risk that an officer may be called upon by circumstances to shoot and possibly kill someone in the line of duty. If it becomes necessary for him to do so, it is reasonably to be expected and therefore one of the known and assumed risks of a police officer's occupation that some person related to or for some other reason concerned about the person killed may, perhaps in a fit of grief or anger, call the officer a murderer. The circumstances involved when someone is shot and killed are almost always ambiguous and subject to the interpretation on the part of someone with a special concern for the deceased that he was killed without justification and intentionally or even with premeditation. A policeman's life is a difficult one, and perhaps one of the most difficult aspects of it is the possibility that he may be called upon to kill and may be subject to bitter criticism as the result of actions taken in the line of duty.

This case involves only the question of assumed risk on the part of a policeman in a situation where he has shot and killed someone. We do not assert, and would not assert, that any citizen has the right maliciously to defame a police officer. We do assert, however, that in the special situation where someone has been shot and killed, it is an assumed risk, a known danger necessarily involved in the occupation of a law enforcement officer that he may be subject to angry abuse if he shoots and kills someone. The assumption of that risk exists as a matter of law and is required as a matter of basic First Amendment policy. Such assumption precludes a defamation action by a policeman against one who, commenting upon the fact that he had shot and killed someone in ambiguous circumstances, imputes to him the crime of murder, i.e., unjustified, intentional, and premeditated killing. It is unfortunate that such reactions are likely to occur, but that is human nature. The officer is precluded from bringing the action, and for that reason, the motion to dismiss below should have been granted; and the decision below in denying the motion must be reversed.

POINT FIVE

THERE IS A DISTINCTION (FOR PURPOSES OF THE POLICY WHICH UNDERLIES THE LAW OF DEFAMATION IN NEW YORK STATE) BETWEEN (A) A SITUATION IN WHICH A PLAINTIFF IS, WITHOUT JUSTIFICATION, ACCUSED BY THE DEFENDANT OF BEING INVOLVED IN A CRIME ARISING OUT OF CIRCUMSTANCES IN WHICH THE PLAINTIFF WAS ABSOLUTELY NOT INVOLVED IN ANY WAY AND WOULD NOT HAVE BEEN SUBJECT TO ANY PUBLIC CRITICISM BUT FOR THE STATEMENT MADE BY THE DEFENDANT, AND (B) THE COMPLETELY DIFFERENT SITUATION IN WHICH THE PLAINTIFF WAS ADMITTEDLY INVOLVED IN AMBIGUOUS FACTUAL CIRCUMSTANCES WHICH GAVE RISE, UNAVOIDABLY, TO PUBLIC DEBATE AS TO WHETHER OR NOT HE HAD COMMITTED A CRIME, WHICH INEVITABLY SUBJECTED HIM TO A GREAT AMOUNT OF PUBLIC ATTENTION AND CRITICISM AND IN WHICH THE DEFENDANT SIMPLY EXPRESSED ONE OF A NUMBER OF DIFFERENT INTERPRETATIONS BEING CONSTANTLY AND VOLUMINOUSLY EXCHANGED IN PRIVATE CONVERSATIONS AND IN THE PUBLIC MEDIA. NEW YORK TIMES V.SULLIVAN AND THE FUNDAMENTAL POLICY UNDERLYING THE FIRST AMENDMENT REQUIRE THAT SUCH A DISTINCTION BE DRAWN EITHER AS A MATTER OF THE NEW YORK LAW OF DEFAMATION OR AS A MATTER OF FEDERAL CONSTITUTIONAL LAW UNDER THE FIRST AMENDMENT. THAT DISTINCTION REQUIRES DISMISSAL OF A COMPLAINT WHICH FALLS SQUARELY WITHIN THE SECOND CATEGORY.

The court below erred in failing to realize and to apply a fundamental distinction inherent in the New York law of defamation involving implication of the plaintiff in criminal charges. The basic policy of the law of defamation in this connection is that if one accuses a man of involvement in criminal conduct and it turns out that he can prove beyond question that he was not in any way involved in the acts in question, then the person wrongly associated with implications of criminal conduct is entitled to recover for the injury to his reputation provided he can prove the necessary elements of defamation and injury. The policy underlying the existence of such a cause of action is that the plaintiff would never have been subject to public criticism and scorn had it not been for the statements made by the defendant, and in such circumstances, the law imposes a duty upon the defendant to speak with care and to some degree at his peril lest it come out ultimately that he has implicated the wrong man in disreputable circumstances.

The present case presents a completely different situation. This is not a case in which the defendant is accused of implicating an innocent man in a crime. Here the plaintiff definitely was involved in the circumstances in question. Gilligan definitely did shoot and kill James Powell. The fact of the killing gave rise, unavoidably, to public debate as to whether or not he had committed a crime. He was inevitably subjected to a great amount of public attention and criticism. The factual circumstances involved in the shooting were, because of the available evidence, subject to differing interpretations. One of those interpretations was that Gilligan had killed Powell without justification and had in fact murdered him. That interpretation was constantly and voluminously expressed or implicit in the discussions in various news media and in private conversations.

Defendant Farmer is simply accused of expressing that interpretation publicly.

Thus we do not have in this case a situation in which the defendant is accused of involving a completely innocent man in implications of criminal conduct. Because of that fact, we submit that the law doesnot impose upon the defendant in such circumstances the same duty it imposes where the plaintiff would not have been subject to any approbrium but for his being named by the defendant. Farmer is not charged with involving a completely innocent man, but with commenting upon messy circumstances involving possible criminal conduct in which the plaintiff was already inextricably involved. Therefore, the duty to be careful before possibly injuring an uninvolved person was not present. Gilligan was, at the time of the alleged statements, already the subject of much adverse and highly hostile criticism, discussion, and comment. If defendant Farmer did anything, he simply added to that discussion.

Because Gilligan was not an uninvolved person, because he was a public official within the meaning of New York Times v. Sullivan, and because the First Amendment involves a substantial public policy of encouraging debate on the conduct of public officials, the ordinary principals of defamation applicable in a case of accusation of crime do not apply. No cause of action exists upon the unusual facts of this case, and the court below committed reversible error in failing to recognize the peculiar circumstances of this case distinguishing them from the ordinary defamation action and in refusing to dismiss the complaint herein with prejudice.

CONCLUSION

In light of the foregoing, the order below must be reversed. Given the clear-cut state of the record, the court below should be directed to dismiss the complaint against the defendants James Farmer and CORE with prejudice or, in the alternative, it should be directed to hold a new hearing for determination of the issues presented by the motion to dismiss.

Respectfully submitted,

Dated: New York, N.Y.
December 4, 1967

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Calendar No.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

- -x

THOMAS R. GILLIGAN

Plaintiff-Respondent

-against-

JAMES FARMER AND CONGRESS OF RACIAL EQUALITY, INC.,
also known as "CORE",

Defendants-Appellants.

- -x

Index #:
15092/65

BRIEF OF DEFENDANTS - APPELLANTS - JAMES FARMER AND CONGRESS OF RACIAL EQUALITY

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TABLE OF CONTENTS

Questions Presented 1

Procedural Statement 3

Statement of the Case 4

Argument:

I. IT WAS REVERSIBLE ERROR CONTRARY TO THE HOLDING OF NEW YORK TIMES V. SULLIVAN AND TO THE FIRST AMENDMENT POLICY UNDERLYING THAT DECISION WHEN THE COURT BELOW FAILED TO DECIDE AS A MATTER OF LAW WHETHER OR NOT, IN THE CIRCUMSTANCES OF THIS CASE, ACTUAL MALICE MOTIVATED THE STATEMENTS IN QUESTION BY DEFENDANT JAMES FARMER. 12

II. THE DECISION BELOW WAS REVERSIBLE ERROR IN THAT THE COURT FAILED TO RECOGNIZE THAT THE POLICY BEHIND THE DECISION OF THE UNITED STATES SUPREME COURT IN NEW YORK TIMES V. SULLIVAN REQUIRES DISMISSAL OF A SUBSTANTIAL PROPORTION OF THE DEFAMATION CASES BROUGHT BY PUBLIC OFFICIALS AND THAT THIS CASE FALLS INTO THAT SUBSTANTIAL CATEGORY OF DEFAMATION ACTION BY SUCH OFFICIALS WHICH MUST BE DISMISSED AS A MATTER OF LAW. 21

III. BECAUSE THE OBLIGATIONS OF A POLICE OFFICER INCLUDE THE DUTY TO CARRY A REVOLVER AND THEREFORE INVOLVE THE RISK THAT HE MAY BE CALLED UPON BY CIRCUMSTANCES TO SHOOT AND POSSIBLY KILL SOMEONE IN THE LINE OF DUTY, IT IS REASONABLY TO BE EXPECTED AND THEREFORE ONE OF THE ASSUMED RISKS OF A POLICE OFFICER'S OCCUPATION THAT SOME PERSON RELATED TO OR FOR SOME OTHER REASON CONCERNED ABOUT THE PERSON KILLED MAY CALL THE OFFICER A MURDERER. THE ASSUMPTION OF SUCH RISK AS PART OF HIS JOB PRECLUDES A POLICE OFFICER AS A MATTER OF LAW FROM PROSECUTING A DEFAMATION ACTION WHERE SUCH AN ACCUSATION IS MADE AS THE RESULT OF AN INCIDENT IN WHICH HE SHOOTS AND KILLS SOMEONE 24

IV. THERE IS A DISTINCTION (FOR PURPOSES OF THE POLICY WHICH UNDERLIES THE LAW OF DEFAMATION IN NEW YORK STATE) BETWEEN (A) A SITUATION IN WHICH A PLAINTIFF IS, WITHOUT JUSTIFICATION, ACCUSED BY THE DEFENDANT OF BEING INVOLVED IN A CRIME ARISING OUT OF CIRCUMSTANCES IN WHICH THE PLAINTIFF WAS ABSOLUTELY NOT INVOLVED IN ANY WAY AND WOULD NOT HAVE BEEN SUBJECT TO ANY

PUBLIC CRITICISM BUT FOR THE STATEMENT MADE BY THE DEFENDANT, AND (B) THE COMPLETELY DIFFERENT SITUATION IN WHICH THE PLAINTIFF WAS ADMITTEDLY INVOLVED IN AMBIGUOUS FACTUAL CIRCUMSTANCES WHICH GAVE RISE, UNAVOIDABLY, TO PUBLIC DEBATE AS TO WHETHER OR NOT HE HAD COMMITTED A CRIME, WHICH INEVITABLY SUBJECTED HIM TO A GREAT AMOUNT OF PUBLIC ATTENTION AND CRITICISM AND IN WHICH THE DEFENDANT SIMPLY EXPRESSED ONE OF A NUMBER OF DIFFERENT INTERPRETATIONS BEING CONSTANTLY AND VOLUMINOUSLY EXCHANGED IN PRIVATE CONVERSATIONS AND IN THE PUBLIC MEDIA. NEW YORK TIMES V. SULLIVAN AND THE FUNDAMENTAL POLICY UNDERLYING THE FIRST AMENDMENT REQUIRE THAT SUCH A DISTINCTION BE DRAWN EITHER AS A MATTER OF THE NEW YORK LAW OF DEFAMATION OR AS A MATTER OF FEDERAL CONSTITUTIONAL LAW UNDER THE FIRST AMENDMENT. THAT DISTINCTION REQUIRES DISMISSAL OF A COMPLAINT WHICH FALLS SQUARELY WITHIN THE SECOND CATEGORY. 28

Conclusion 32

QUESTIONS PRESENTED

(1) Do the decision of the United States Supreme Court in New York Times v. Sullivan and the First Amendment policy underlying that decision require that where a public official brings a defamation action against a defendant who has made a derogatory statement about him and the defendant has moved to dismiss the complaint, the Court before whom the motion is made must rule as a matter of law upon the question of the presence or absence of actual malice and may not defer determination of that question either to another judge handling the case at trial or to a jury?

(2) Was the ruling below reversible error in that the Court failed to recognize that the policy behind the decision of the United States Supreme Court in New York Times v. Sullivan requires dismissal of a substantial proportion of the defamation cases brought by public officials and places upon the trial court in each case an affirmative duty to perform the difficult task of drawing the required line between (i) those cases which must be dismissed because of the constitutional policy of encouraging free debate upon controversial issues and (ii) those cases in which the presence of malice is strongly indicated and in which, for that reason, a trial must be held?

(3) Because the obligations of a police officer include the duty to carry a revolver and therefore involve the risk that he may be called upon by circumstances to shoot and possibly kill someone in the line of duty, is it reasonably to be expected and therefore one of the assumed risks of a police officer's occupation that some person related to, or for some reason concerned about the person killed, may

call the officer a murderer? If it is, does the assumption of such risk as a part of his job preclude the officer as a matter of law from prosecuting a defamation action where such an accusation is made as the result of his shooting and killing someone?

(4) Is there a distinction (for purposes of the policy which underlies the law of defamation in New York State) between (a) a situation in which a plaintiff is, without justification, accused by the defendant of being involved in a crime arising out of circumstances in which the plaintiff was absolutely not involved in any way and would not have been subject to any public criticism but for the statement made by the defendant, and (b) the completely different situation in which the plaintiff is admittedly involved in ambiguous factual circumstances which give rise, unavoidably, to public debate as to whether or not he has committed a crime, which inevitably subject him to a great amount of public attention and criticism, and in which the defendant simply expresses one of a number of different interpretations being constantly and voluminously exchanged in private conversations and in the public news media? Do New York Times v. Sullivan and the fundamental policy underlying the First Amendment require that such a distinction be drawn either as a matter of the New York Law of defamation or as a matter of Federal Constitutional Law under the First Amendment? If the policy behind the law of defamation does create such a distinction, does it also require dismissal of a complaint which falls squarely within the second category?

PROCEDURAL STATEMENT

This is an appeal from an order below of the Supreme Court of the State of New York, County of New York, Special Term, Part I, Mr. Justice Joseph A. Brust presiding, issued on October 29, 1965, and entered in the office of the Clerk of the County of New York on November 1, 1965, denying defendants' motion to dismiss the complaint herein pursuant to Rule 3211(a)(7) and (c) of the CPLR. Defendants-appellants James Farmer and Congress of Racial Equality ("CORE") appeal from each part of said order and from the whole thereof.

Plaintiff Thomas R. Gilligan commenced this slander action by service of summons and verified complaint on May 25, 1965. The named defendants are: James Farmer and Congress of Racial Equality, Inc. ("CORE"). Defendants Farmer and CORE moved before the Court below for dismissal of the complaint against them with prejudice. On November 1, 1965, the Court below, Mr. Justice Joseph A. Brust presiding, denied the motion.

STATEMENT OF THE CASE

The allegedly defamatory statements made by the defendant James Farmer in this case arose out of the fact that that plaintiff, Lieutenant Thomas R. Gilligan of the New York City Police Force, on July 16, 1964, at approximately 9:30 a.m. shot and killed James Powell, a fifteen-year old Negro student at Wagner Junior High School, on East 76th Street in Manhattan, in front of which the shooting took place.

Immediately before the shooting, plaintiff Gilligan was in a television repair shop across the street from Wagner Junior High School. He was off duty and in civilian clothes. There was a disturbance on the street outside to which the plaintiff responded.

The sequence of events which followed has not been, and probably never will be, accurately or satisfactorily reconstructed. All that is known with certainty is that plaintiff, a six-foot, two-hundred pound police officer with seventeen years of experience and numerous citations for bravery, and experienced specifically with handling armed assailants, shot and killed James Powell, who was five-feet-six inches tall, who weighed one hundred and twenty pounds, and who had no significant reputation or record for violence, or for the use of weapons. It was summer in New York City, and there had been apprehension for some time on the part of City officials and of Negro leaders of various persuasions that serious disturbances might arise if the necessary incendiary incident were to occur.

The killing of Powell generated a great amount of agitation and hostility in Harlem, where Powell lived, and in the other Negro communities of New York City. It also became a major news story on all media, including newspapers, radio and television. Various organizations, including the office of the District Attorney for New York County, investigated the matter and reported on it.

The public debate and discussion focused on the question of whether or not the killing of Powell had been justified or was, on the other hand, without justification and therefore a crime, possibly murder. Plaintiff Gilligan maintained that Powell had attacked him with a knife. Statements made by witnesses to the killing caused some persons to believe either that Powell did not have a knife at all or that, if he had a knife, he was not brandishing it and did not attack Gilligan with it.

The killing of Powell triggered a widespread debate in the press and communications media and also among many private citizens. Much heated argument and discussion resulted. Many Negro leaders were called upon by the press, radio, and television to express their views on this matter. Those consulted by various newspapers and broadcasting stations included: Whitney Young of the National Urban League, Roy Wilkins of the National Association for the Advancement of Colored People, the Rev. Martin Luther King, Jr. of the Southern Christian Leadership Conference, Bayard Rustin of the A. Phillip Randolph Foundation, James Farmer then National Director of the Congress of Racial Equality, Inc., and others. Among the functions which some of those spokesmen, James Farmer among them, consciously attempted to serve was that of providing verbal expression for the unarticulated anger that had been generated in the Negro community in the hope that such expression might serve as a peaceful and non-violent substitute or alternative for the violence which was a real and imminent possibility. Emotions were particularly high among the predominantly Negro population of Manhattan's Harlem area.

The killing of Powell resulted in a heated debate within the Negro community which may have had a direct effect upon the riots which occurred that summer in Harlem not long after the shooting occurred. The debate and discussion was not by any means limited to the Negro community, but was a primary topic of general conversation and news reportage for a number of weeks in July and August of 1964.

Defendant James Farmer was, at the time of the shooting, National Director of CORE. The staff of CORE and certain of its attorneys undertook to make an investigation of the Powell shooting incident. That investigation included a systematic interviewing on the day of the killing of more than a dozen persons who stated that they were eyewitnesses to the killing. The witnesses included both Negroes and white persons. It was the consensus of those persons interviewed by CORE as witnesses to the incident that the deceased, James Powell, was not armed when plaintiff Gilligan shot and killed him and that Gilligan had not identified himself as a police officer before he shot Powell. The names of those witnesses and the substance of their statements to the CORE investigators were then sent to District Attorney Hogan's office so that the authorities could obtain whatever information they might be able to provide in connection with the investigation which that office was then conducting. In the course of the investigation by CORE, it received many phone calls from persons who complained of Gilligan's conduct as a policeman.

While the CORE investigation was being conducted, the various news media were busily and energetically engaged in discussing the

Gilligan-Powell incident as the number one news story in New York City at the time. The main unresolved questions under discussion and examination were the as yet unresolved problem of whether Powell had a knife when he was killed, whether, if he had a knife it was in his pocket or in his hand or, if in his hand, open or closed, and whether or not Gilligan identified himself as a policeman before shooting Powell.

While the CORE investigation was in progress, the CORE office received two separate and substantially similar telephone calls from a person who identified himself as a nurse's aid at a veteran's hospital in the immediate vicinity of plaintiff Gilligan's residence and who stated that plaintiff Gilligan was then receiving treatment at a hospital for mental problems of some kind. The caller gave a number which he said was plaintiff Gilligan's Veteran's Administration case number. Such a hospital does exist at First Avenue and Twenty Fourth Street across the street from Stuyvesant Town, where plaintiff is believed to have lived at that time. The information received from the caller was passed on to an Assistant District Attorney for New York County who was at that time in charge of the Gilligan investigation.

It was in the context of CORE's investigation and the massive news debate then in progress that the alleged statements upon which this slander action is based were made by defendant James Farmer. Paragraph 6 of the complaint alleges, upon information and belief, that "on or about the 19th day of July, 1964, in the County, City, and State of New York, defendant James Farmer, individually and acting in his capacity as National Director of defendant CORE....maliciously" uttered certain allegedly defamatory words. Paragraph 7 of the complaint states, also upon information and belief, that the words referred to were:

> "James Powell was shot in cold blood. Lieutenant Gilligan must be arrested and charged with murder."

There is nothing in the record, either in the complaint or in the affidavit of plaintiff (R-28) which identifies in any way the information upon which plaintiff bases his belief that defendant Farmer uttered those words. There is nothing to indicate that plaintiff has or may obtain any admissible evidence with which to establish that fact. No indication has been made either to the Court below or to this Court as to where or in what context those words are believed to have been uttered. A more substantial indication that a genuine justiciable issue exists is required of the plaintiff than has been presented in this case if he is to withstand a motion to dismiss.

Paragraph 15 of the complaint, in the second cause of action, states, also upon information and belief, that defendant uttered the following allegedly defamatory words:

> "Information has come to me that Thomas Gilligan is presently in a mental institution receiving treatment."

Paragraph 14 states, also upon information and belief, that on or about July 20, 1964, defendant James Farmer uttered those words. As with the other allegedly defamatory statement, so with this one: there is nothing on the record to indicate what the basis of plaintiff's belief is that the statement quoted was actually made by defendant Farmer.

If the statement that Gilligan shot Powell in cold blood and should be charged with murder was actually made by defendant Farmer, that statement was made in the context of the intensive investigation of that incident which had been conducted by CORE and represented the considered conclusion of James Farmer as to what action by the appropriate public officials was required by the facts as he, after diligent investigation, believed them to be. In the circumstances, the imputation of malice is completely lacking in justification.

If the statement that information had come to Farmer that plaintiff Gilligan was at the time of the statement in a mental institution receiving treatment was actually made by Farmer, that statement represented nothing more than a somewhat ill-phrased report of the telephone calls received by the CORE investigators which were, in light of the specific information presented by them, on their face subject to serious consideration. It is perfectly apparent from the phrasing of the statement as quoted that the person who uttered it intended, without the benefit of the sophistication in matters of defamation possessed by reporters and other professional newsmen, to pass on the fact that a report had been received that Gilligan was receiving treatment for mental symptoms of some kind. Given the fact that plaintiff Gilligan was at that time under an incredible amount of pressure generated by the news coverage given to the incident of his shooting of Powell, it is not difficult to understand why there may have been a tendency to accept a report that Mr. Gilligan was seeking treatment for symptoms of nervous distress. It is indeed quite believable that if Gilligan were a veteran entitled to free medical care at a veteran's hospital and if such a hospital were situated closer to his residence than perhaps a private physican, and he felt in need of some form of medication to relieve symptoms of nervous stress such as insomnia or nervous stomach, he might very well have walked across the street to the veteran's hospital, described his symptoms and sought appropriate medication and treatment.

In those circumstances, the imputation of malice to the person who allegedly uttered the quoted statement, has no substantial foundation, and certainly lacks those strong indicia of actual malice which must be present and clearly indicated if a complaint is to withstand a motion to dismiss based upon the decision of the United States Supreme Court in New York Times v. Sullivan.*

The nature of defendant Farmer's attitude toward Lieutenant Gilligan at the time when the allegedly defamatory statements involved in this case were made, is clearly reflected in the following statement made by him on a television program broadcast over WNBC television in New York City on Sunday, July 26, 1964. The program was entitled "Who Speaks for Harlem?" and on it certain news reporters, including Al Robbins of the New York Journal American, Layhmond Robinson of the New York Times, Joseph Micheals of NBC news and Gabe Pressman of NBC news questioned the following Negro leaders about the looting, rioting and blood-shed which had at that time been in progress in Harlem for two days: James Farmer, National Director of the Congress of Racial Equality, Bayard Rustin, chief organizer of the 1963 march on Washington and Executive Director of the A. Phillip Randolph Foundation, Basil Patterson, a spokesman for the New York branch of the National Association for the Advancement of Colored People and Cleveland Robinson, a member of the New York City Commission on Human Rights and Secretary-Treasurer of District 65, Retail, Wholesale and Department Store Union, AFL-CIO.

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* See also Rosenblatt v. Baer 383 U.S. 75, 85-86 (1966); Chiapinelli-Marx, Inc. v. Pacitto, 46 Misc. 2d 611, 260 N.Y.S.2d 355,357 (Sup. Ct., Westchester Co., 1965, Supple, J.) (Motion to dismiss granted)

In response to a question posed by Mr. Robbins, Mr. Farmer stated:

> "Well, I think in the first place, Lieutenant Gilligan should have been suspended even while the case of the shooting of young James Powell was to go before the Grand Jury. In the second place, the Mayor should have come out forthrightly for an independent civilian review board. This he did not do. He merely said that he was going to review them and he was assigning one of his deputies to do this job of reviewing in his behalf."

Thus, in a statement made a few days after the alleged statements relied upon in this case, defendant Farmer presented quite clearly his feeling and opinion about the Gilligan incident and what the appropriate official action about it should have been. There is absolutely no reason to think that his attitude or motive was any different when, if he uttered them at all, the statements attributed to him by the plaintiff were made.

POINT ONE

IT WAS REVERSIBLE ERROR CONTRARY TO THE HOLDING OF NEW YORK TIMES V. SULLIVAN AND TO THE FIRST AMENDMENT POLICY UNDERLYING THAT DECISION WHEN THE COURT BELOW FAILED TO DECIDE AS A MATTER OF LAW WHETHER OR NOT, IN THE CIRCUMSTANCES OF THIS CASE, ACTUAL MALICE MOTIVATED THE STATEMENTS IN QUESTION BY DEFENDANT JAMES FARMER.

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court of the United States held that "public officials" are prohibited by the First Amendment to the federal Constitution from recovering damages as the consequences of defamatory falsehoods uttered against them unless they are able to prove that the statement in question was made with "actual malice," i.e., with knowledge that the factual statement made was false or as the result of recklessness or gross negligence in failing to consider or to determine whether or not it was false. In its opinion, the Supreme Court stated:

> "The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice--that is with knowledge that it was false or with reckless disregard of whether it was false or not'" 376 U.S. at 279-80.

It is quite clear from a reading of the opinion in the New York Times case that the Supreme Court was thereby undertaking to establish a vigorous and practical judicial doctrine designed effectively to remove from the realm of litigation a substantial proportion of the defamation actions which had been brought prior to that time by public officials interested in safe-guarding their reputations against persons who had made critical and false statements about them. Since the underlying view behind the opinion clearly was one of encouraging discussion, and free-wheeling discussion, of public officials as perhaps the most fundamental and essential element of a truly democratic society,* the intended practical effect of the opinion was undoubtedly first to discourage public officials from bringing defamation actions against their critics unless they possessed substantial proof of personal ill-feeling toward them on the part of the proposed defendant, second, to encourage trial court judges to view defamation actions by public officials with a very strict eye toward protection of public debate and with the idea clearly in mind that the complaint should be dismissed unless substantial indications of malice are clearly present, and third, that the appropriate time in the course of litigation for eliminating those cases which should not be allowed to proceed for lack of sufficiently strong indications of actual malice is at the outset of litigation through dismissal of the complaint with prejudice.

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* Sullivan at 270; Garrison v. Louisiana 379 U.S. 64 (1964) at 73-75; Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966)

The intended effect of encouraging outspoken public criticism of public officials can only be accomplished if the Courts demonstrate by their approach to defamation actions instituted by public officals that those who utter critical statements (or who pass on plausible second hand reports which contain untrue statements) will be granted effective protection. Such effective protection will not exist and discussion and criticism of public officials will not be encouraged, but in fact will be discouraged, if every defamation action brought by a public official against one of his critics is allowed to proceed to trial not on the formerly available issue of simple defamation, but on the semantically different but in many ways similar issue of malice. It will not put at rest the mind of a potential speaker on public affairs if his lawyer advises him that statements of questionable truth made by him will result in sustained litigation and ultimate trial not on the issue of defamation, but on the issue of his motives in uttering otherwise defamatory matter. Regardless of what the issue is, if the man is going to be put to the expense and test of a trial, he will be cautious about his comments rather than free as the Supreme Court wishes to encourage him to be.

If New York Times Co. v. Sullivan is to have any practical meaning, it must be clearly demonstrated in the opinions of the Courts who are faced with defamation actions by public officials against their critics and in the dispositions actually made of the cases that some real protection in the nature of a shield against litigation is provided by that land-mark Supreme Court decision. The cases simply must show that if a public official brings a defamation action against someone who utters either a critical opinion of him which borders upon being an assertion of fact or a statement of fact which the defendant not unreasonably assumed to be true (or reported for whatever is was worth) that action will be dismissed as a matter of law in the absence of a substantial showing that the critical or defamatory utterances in question were in fact done out of some form of personal animus and unjustified desire to injure the plaintiff rather than as an honest and forthright expression of the views of the speaker on a matter of public interest and debate. If that conclusion cannot be drawn from the cases interpreting New York Times Co. v. Sullivan, then that decision is of no practical value whatever and might just as well never have been written.

By the same token, if the purpose of providing truly meaningful encouragement of public debate through judicial action is really embodied in New York Times Co. v. Sullivan and is taken seriously by the Courts, two things become apparent: (1) that a significant proportion, perhaps a majority, of the defamation actions brought by public officials against their critics must be dismissed and (2) dismissal of those actions must be made (a) by a judge in most cases, rather than by a jury, and (b) not at trial, but at an early stage of the litigation. If only an insignificant number of cases are dismissed as the result of New York Times v. Sullivan, its purpose of encouraging debate will obviously be frustrated. If in the vast majority of defamation actions by public officials against their critics, the official is permitted simply by alleging actual malice to go past the stage of a motion for summary judgment to trial, a very effective weapon will be placed in the hands of public officials.

When a judge is asked to consider a motion to dismiss in a defamation action brought by a public official against someone who has commented publicly upon his behavior, he is asked to perform a highly sophisticated and rather difficult task of analysis and judgment, one which is pecularily appropriate for determination by a judge. In the first place, he must realize that there are two separate questions involved in his task. One is the factual question of whether or not the defendant acted with a conscious and unjustified purpose of injuring the plaintiff (and not simply out of a desire to express his views on the behavior of a public official), and the other, more important, question involves the weighing of the plaintiff's likelihood of winning on the issue of actual malice considered in the light of the strong public policy toward discouraging such suits embodied in New York Times Co. v. Sullivan.* It is the second question that is really fundamentally at issue on the motion for dismissal or summary judgment. There is in any defamation action always an issue as to whether or not a statement, if defamatory, was made maliciously. In ordinary defamation actions, all of the issues are allowed to go to the jury. However, actions by public officials are different. The teaching of the New York Times case is that they should not be allowed to sue unless they have a strong case on malice. The determination therefore, is similar to that which a judge must make upon a motion for a temporary injunction. There he must determine whether or not the plaintiff has shown that there is sufficient substance to his case and sufficient likelihood of ultimate recovery to justify the granting of extraordinary relief.

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* See also, Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966)

The problem on a motion to dismiss in a defamation action brought by a public official is essentially the same. There the judge is asked to determine whether or not the plaintiff has shown sufficient substance to his case on malice and sufficient likelihood of recovery to overcome the presumption against his being allowed to continue the suit created by New York Times and based upon extremely weighty considerations which probe the fundamental depths of the First Amendment. The test cannot be the same in a New York Times Co. v. Sullivan case as it is in the ordinary run-of-the-mill litigation, for a strong public policy and public interest in free debate on the behavior of public officials enters the picture and casts a greater burden upon the plaintiff. We submit that the reading of the decision of Mr. Justice Helman upon which Mr. Justice Brust below based denial of the motion to dismiss in this case, discloses that the decision of the Court below was based upon fundamental error with respect to the understanding of the Court of the nature of the issues before it and of the burden placed upon the plaintiff in order to withstand the motion. Plaintiff did not even come close to providing any strong indication that he is likely to succeed on the issue of malice. Indeed, upon analysis, it is perfectly clear that plaintiff's case on malice is, so far as he has disclosed it, virtually non-existent and would not even create an issue for the jury at trial.* He has shown absolutely nothing whatever to indicate that the defendant Farmer had any personal animus against him. The circumstances of the case show quite clearly, however, that the public news media and the community at-large had a very great interest in obtaining the views of Negro leaders on the problems created by the Gilligan case and how they should be dealt with by public officials in order to avert the riots which that incident threatened to ignite.

In light of the foregoing, we submit that the denial of defendant's motion to dismiss was based upon reversible error in that Mr.Justice Brust and Mr. Justice Helman regarded the question as an ordinary motion to dismiss so far as the issue of actual malice is concerned. That was error because the holding and policy of New York Times v. Sullivan requires a greater showing of substance to the plaintiff's case and greater likelihood of ultimate success than is required to withstand a motion to dismiss in an ordinary case. For that reason, the decision below should be reversed.

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* Chiappinelli-Marx,Inc. v. Pacitto, 46 Misc. 2d 611, 260 N.Y.S. 2d 355, 357 (Sup. Ct. Westchester Co., 1965, Supple, J.) (Motion to dismiss defamation action granted.); Keogh v. New York Herald Tribune, Inc., 51 Misc.2d 888, 274 N.Y.S.2d 304 (Sup. Ct. N.Y. Co., 1966, Gelinoff, J.) (Ct. held that sufficient evidence had been presented to create a jury question on actual malice.)

POINT TWO

THE DECISION BELOW WAS REVERSIBLE ERROR IN THAT THE COURT FAILED TO RECOGNIZE THAT THE POLICY BEHIND THE DECISION OF THE UNITED STATES SUPREME COURT IN NEW YORK TIMES V. SULLIVAN REQUIRES DISMISSAL OF A SUBSTANTIAL PROPORTION OF THE DEFAMATION CASES BROUGHT BY PUBLIC OFFICIALS AND THAT THIS CASE FALLS INTO THAT SUBSTANTIAL CATEGORY OF DEFAMATION ACTIONS BY SUCH OFFICIALS WHICH MUST BE DISMISSED AS A MATTER OF LAW.

The thrust of the argument under Point One, supra, is that the issue on a motion to dismiss in a case such as this is, in the majority of such cases, a matter for judicial determination based upon an estimate of the substance of plaintiff's case on malice in light of the substantial constitutional policy favoring dismissal. Thus that argument was that the court below erred in failing to realize that the question was essentially one of law and not simply a matter of determining whether or not plaintiff has satisfied the ordinary test of a motion to dismiss. The argument here is related and partly made above. It is directed not to the nature of the determination which should have been made below, but to the apparent failure of the court below to understand and to apply properly the holding of New York Times Co. v. Sullivan and the underlying policy behind that decision.

The argument here is simply that the approach taken by Mr. Justice Helman and adopted by Mr. Justice Brust below, threatens to vitiate the intended practical effect of the Sullivan case, i.e., that of providing real, practical judicial protection for critics of public officials. The approach taken below was simply to say that while Sullivan precludes trial on the simple issue of common defamation, whenever a defamatory statement is made about a public official, he has a right to trial on the issue of actual malice. As is stated above, if this approach were taken by every court, there would be no effective, practical protection provided for critics of public officials and the intended protective effect of the opinion in New York Times Co. v. Sullivan would be entirely vitiated.

If the New York Times case is to have any practical meaning at all, there has to be a realization by the courts that the Supreme Court intended that they apply strict standards in testing the substance of the public official's case on malice and that they dismiss a substantial number of cases, namely all of those in which an examination of the circumstances of the statements in question discloses that there is not a substantial likelihood that plaintiff will prevail on the issue of malice. In effect, New York Times v. Sullivan creates a presumption against continuance of such cases and indicates that such a presumption is required by extremely important policy considerations grounded in the First Amendment.

Free speech considerations are involved in the ordinary defamation action, but free speech considerations of a much higher order are involved when the defamation action involves the basic machinery of an open,democratic society which is free discussion of questions related to the operation of government.* Where the conduct of public officials is the subject of the alleged defamatory statements, a more stringent test must be applied because there is a much greater public interest in debate about the conduct of government than there is in debate about the character, competence, or virtue of an ordinary citizen.* The importance of this distinction must be realized and its implications applied. Because the court below did not appreciate this distinction and did not apply it, the determination below was grounded in a misunderstanding of applicable law, was in error, and must be reversed.

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* Sullivan at 270
Garrison at 73-75
Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966)

POINT THREE

BECAUSE THE OBLIGATIONS OF A POLICE OFFICER INCLUDE THE DUTY TO CARRY A REVOLVER AND THEREFORE INVOLVE THE RISK THAT HE MAY BE CALLED UPON BY CIRCUMSTANCES TO SHOOT AND POSSIBLY KILL SOMEONE IN THE LINE OF DUTY, IT IS REASONABLY TO BE EXPECTED AND THEREFORE ONE OF THE ASSUMED RISKS OF A POLICE OFFICER'S OCCUPATION THAT SOME PERSON RELATED TO OR FOR SOME OTHER REASON CONCERNED ABOUT THE PERSON KILLED MAY CALL THE OFFICER A MURDERER. THE ASSUMPTION OF SUCH RISK AS PART OF HIS JOB PRECLUDES THE POLICE OFFICER AS A MATTER OF LAW FROM PROSECUTING A DEFAMATION ACTION WHERE SUCH AN ACCUSATION IS MADE AS THE RESULT OF AN INCIDENT IN WHICH HE SHOOTS AND KILLS SOMEONE.

It is a fundamental principal of that area of the law of torts known as "assumption of risk" that one who voluntarily enters a dangerous situation or occupation with knowledge of the particular risk which subsequently results in injury or alleged injury to him is deemed as a matter of law to have assumed the known risk and is barred from recovering for his injuries. Thus, where a man voluntarily accepts employment knowing that he is expected to work with a dangerous machine or animal or ride in a defective automobile, he accepts the responsibility of the inherent dangers of the undertaking to the extent that they are known to him and undertakes, in effect, to look out for himself. Cf. La Fleur v. Vergillia, 280 App. Div. 1035, 117 NY Supp. 2d 244 (1952), a case involving assumption of risk by one who voluntarily undertook the occupation of teaching beginning drivers to operate an automobile. All jurisdictions, including New York, recognize the principal that where a person enters a situation both voluntarily and with knowledge that certain dangers are inherently involved, he is deemed to have assumed the risks of the reasonably foreseeable consequences of the dangers known to him. Where those known dangers involve foreseeable acts by other persons, the one who has assumed the risk is foreclosed from litigation against such person as a matter of law. Murphy v. Steeplechase Amusement Co., 250 N.Y. 479 (1929); Hammel v. Madison Square Garden Corp., 156 Misc. 311, 279 N.Y. Supp. 815 (1935).

The present situation falls squarely within the rule with respect to assumption of risk. In addition, the teaching of New York Times Co. v. Sullivan indicates that First Amendment considerations add an additional factor in support of the proposition that not only did Gilligan voluntarily assume the risk involved in this case, but considerations related to the necessity of free debate upon the conduct of public officials require that he have assumed them.

When Lieutenant Gilligan became a police officer seventeen years ago, he knew that the obligations of a policeman include the duty to carry a revolver at all times and therefore involve unavoidably the risk that an officer may be called upon by circumstances to shoot and possibly kill someone in the line of duty. If it becomes necessary for him to do so, it is reasonably to be expected and therefore one of the known and assumed risks of a police officer's occupation that some person related to or for some other reason concerned about the person killed may, perhaps in a fit of grief or anger, call the officer a murderer. The circumstances involved when someone is shot and killed are almost always ambiguous and subject to the interpretation on the part of someone with a special concern for the deceased that he was killed without justification and intentionally or even with premeditation. A policeman's life is a difficult one, and perhaps one of the most difficult aspects of it is the possibility that he may be called upon to kill and may be subject to bitter criticism as the result of actions taken in the line of duty.

This case involves only the question of assumed risk on the part of a policeman in a situation where he has shot and killed someone. We do not assert, and would not assert, that any citizen has the right maliciously to defame a police officer. We do assert, however, that in the special situation where someone has been shot and killed, it is an assumed risk, a known danger necessarily involved in the occupation of a law enforcement officer that he may be subject to angry abuse if he shoots and kills someone. The assumption of that risk exists as a matter of law and is required as a matter of basic First Amendment policy. Such assumption precludes a defamation action by a policeman against one who, commenting upon the fact that he had shot and killed someone in ambiguous circumstances, imputes to him the crime of murder, i.e., unjustified, intentional, and premeditated killing. It is unfortunate that such reactions are likely to occur, but that is human nature. The officer is precluded from bringing the action, and for that reason, the motion to dismiss below should have been granted; and the decision below in denying the motion must be reversed.

POINT FOUR

THERE IS A DISTINCTION (FOR PURPOSES OF THE POLICY WHICH UNDERLIES THE LAW OF DEFAMATION IN NEW YORK STATE) BETWEEN (A) A SITUATION IN WHICH A PLAINTIFF IS, WITHOUT JUSTIFICATION, ACCUSED BY THE DEFENDANT OF BEING INVOLVED IN A CRIME ARISING OUT OF CIRCUMSTANCES IN WHICH THE PLAINTIFF WAS ABSOLUTELY NOT INVOLVED IN ANY WAY AND WOULD NOT HAVE BEEN SUBJECT TO ANY PUBLIC CRITICISM BUT FOR THE STATEMENT MADE BY THE DEFENDANT, AND (B) THE COMPLETELY DIFFERENT SITUATION IN WHICH THE PLAINTIFF WAS ADMITTEDLY INVOLVED IN AMBIGUOUS FACTUAL CIRCUMSTANCES WHICH GAVE RISE, UNAVOIDABLY, TO PUBLIC DEBATE AS TO WHETHER OR NOT HE HAD COMMITTED A CRIME, WHICH INEVITABLY SUBJECTED HIM TO A GREAT AMOUNT OF PUBLIC ATTENTION AND CRITICISM AND IN WHICH THE DEFENDANT SIMPLY EXPRESSED ONE OF A NUMBER OF DIFFERENT INTERPRETATIONS BEING CONSTANTLY AND VOLUMINOUSLY EXCHANGED IN PRIVATE CONVERSATIONS AND IN THE PUBLIC MEDIA. NEW YORK TIMES V.SULLIVAN AND THE FUNDAMENTAL POLICY UNDERLYING THE FIRST AMENDMENT REQUIRE THAT SUCH A DISTINCTION BE DRAWN EITHER AS A MATTER OF THE NEW YORK LAW OF DEFAMATION OR AS A MATTER OF FEDERAL CONSTITUTIONAL LAW UNDER THE FIRST AMENDMENT. THAT DISTINCTION REQUIRES DISMISSAL OF A COMPLAINT WHICH FALLS SQUARELY WITHIN THE SECOND CATEGORY.

The court below erred in failing to realize and to apply a fundamental distinction inherent in the New York law of defamation involving implication of the plaintiff in criminal charges. The basic policy of the law of defamation in this connection is that if one accuses a man of involvement in criminal conduct and it turns out that he can prove beyond question that he was not in any way involved in the acts in question, then the person wrongly associated with implications of criminal conduct is entitled to recover for the injury to his reputation provided he can prove the necessary elements of defamation and injury. The policy underlying the existence of such a cause of action is that the plaintiff would never have been subject to public criticism and scorn had it not been for the statements made by the defendant, and in such circumstances, the law imposes a duty upon the defendant to speak with care and to some degree at his peril lest it come out ultimately that he has implicated the wrong man in disreputable circumstances.

The present case presents a completely different situation. This is not a case in which the defendant is accused of implicating an innocent man in a crime. Here the plaintiff definitely was involved in the circumstances in question. Gilligan definitely did shoot and kill James Powell. The fact of the killing gave rise, unavoidably, to public debate as to whether or not he had committed a crime. He was inevitably subjected to a great amount of public attention and criticism. The factual circumstances involved in the shooting were, because of the available evidence, subject to differing interpretations. One of those interpretations was that Gilligan had killed Powell without justification and had in fact murdered him. That interpretation was constantly and voluminously expressed or implicit in the discussions in various news media and in private conversations.

Defendant Farmer is simply accused of expressing that interpretation publicly.

Thus we do not have in this case a situation in which the defendant is accused of involving a completely innocent man in implications of criminal conduct. Because of that fact, we submit that the law doesnot impose upon the defendant in such circumstances the same duty it imposes where the plaintiff would not have been subject to any approbrium but for his being named by the defendant. Farmer is not charged with involving a completely innocent man, but with commenting upon messy circumstances involving possible criminal conduct in which the plaintiff was already inextricably involved. Therefore, the duty to be careful before possibly injuring an uninvolved person was not present. Gilligan was, at the time of the alleged statements, already the subject of much adverse and highly hostile criticism, discussion, and comment. If defendant Farmer did anything, he simply added to that discussion.

Because Gilligan was not an uninvolved person, because he was a public official within the meaning of New York Times v. Sullivan, and because the First Amendment involves a substantial public policy of encouraging debate on the conduct of public officials, the ordinary principals of defamation applicable in a case of accusation of crime do not apply. No cause of action exists upon the unusual facts of this case, and the court below committed reversible error in failing to recognize the peculiar circumstances of this case distinguishing them from the ordinary defamation action and in refusing to dismiss the complaint herein with prejudice.

CONCLUSION

Based upon the foregoing, the order below should be reversed with instructions to dismiss the action or to reconsider the motion of defendants James Farmer and CORE in light of the opinion of this Court.

Respectfully submitted,

Dated: New York, N.Y.
December 4, 1967

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Calendar No.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

- -x

THOMAS R. GILLIGAN,

Plaintiff-Respondent

-against

JAMES FARMER AND CONGRESS OF RACIAL EQUALITY, INC.,
also known as "CORE",

Defendants-Appellants.

- -x

REPLY BRIEF OF DEFENDANTS-APPELLANTS - JAMES FARMER AND CONGRESS OF RACIAL EQUALITY

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TABLE OF CONTENTS

Argument:

I. APPELLEE'S BRIEF MAKES NO RESPONSE TO APPELLANT FARMER'S CONTENTION THAT THE COURT BELOW COMMITTED REVERSIBLE ERROR AND VIOLATED DUE PROCESS BY RELYING, AS THE BASIS FOR DENYING FARMER'S MOTION TO DISMISS, UPON THE OPINION OF ANOTHER JUDGE MADE IN A DIFFERENT CASE BASED UPON RADICALLY DIFFERENT FACTS AND IN WHICH SUBSTANTIALLY DIFFERENT ISSUES AND ARGUMENTS WERE PRESENTED 1

II. APPELLEE'S BRIEF IGNORES COMPLETELY THE FACT THAT HE HAS FAILED TO PRODUCE AS REQUIRED BY LAW "EVIDENTIARY FACTS" TO SUPPORT THE MATERIAL ALLEGATIONS OF HIS COMPLAINT AND TO CORRECT DEFECTS OF REQUIRED SPECIFICITY IN THE COMPLAINT. APPELLEE SIMPLY ATTEMPTS TO CONFUSE THE MAIN ISSUE BY ALLEGING THAT APPELLANT HAS FAILED TO SUPPORT HIS SWORN DENIALS OF MATERIAL ALLEGATIONS WITH EVIDENCE THAT SUCH DENIALS ARE TRUE. 4

III. DEFENDANT-APPELLANT'S ARGUMENT BASED UPON "ASSUMPTION OF RISK" IS PRESENTED IN COMPLETE SERIOUSNESS AND IN THE BELIEF THAT THERE IS SUBSTANTIAL MERIT TO THAT ARGUMENT. PLAINTIFF-APPELLEE HAS APPARENTLY FAILED EITHER TO UNDERSTAND OR TO APPRECIATE THAT ARGUMENT 7

Conclusion 11

POINT ONE

APPELLEE'S BRIEF MAKES NO RESPONSE TO APPELLANT FARMER'S CONTENTION THAT THE COURT BELOW COMMITTED REVERSIBLE ERROR AND VIOLATED DUE PROCESS BY RELYING, AS THE BASIS FOR DENYING FARMER'S MOTION TO DISMISS, UPON THE OPINION OF ANOTHER JUDGE MADE IN A DIFFERENT CASE BASED UPON RADICALLY DIFFERENT FACTS AND IN WHICH SUBSTANTIALLY DIFFERENT ISSUES AND ARGUMENTS WERE PRESENTED.

This action was brought by plaintiff-appellee exclusively against appellant James Farmer and CORE based upon two oral statements allegedly uttered by Farmer in his then capacity as National Director of CORE. It involves that aspect of the law of defamation known as "slander." It is completely different from a related "libel" action also brought by Lieutenant Gilligan, (1) as to the material allegations of the complaint, (2) as to the named defendants, and (3) as to the operative theory of recovery and controlling principles of law.

The related libel action is based upon the publication of mock "wanted" posters bearing Gilligan's picture and name. Its basic theory is that of conspiracy to commit libel, and named as defendants are William Epton, Martin Luther King, Jessie Gray and a number of other individuals and organizations, including the company that printed the poster and its president. That action is sometimes referred to by counsel as the "poster case" to distinguish it from the "slander case" involving only Farmer and CORE.

The two actions are on their face completely different. The alleged defamatory utterances are different, the mode and context of alleged utterances are different, the alleged defendants are different, and one case rests precariously upon a theory of conspiracy, while the other focuses exclusively on James Farmer.

Separate motions to dismiss were made in the poster case by defendant Epton and by defendant Farmer. Those motions were made before different judges. The arguments presented by Epton and by Farmer rested primarily on the Federal Constitution and on the New York Times case in particular, but the briefs were by no means identical, since, among other things, Farmer claimed never to have heard of the poster until after its distribution and never to have spoken with anyone about it until that time, whereas an organization led by Epton was named on the poster as responsible for its issuance.

Farmer also made a motion to dismiss in the present (slander) case based upon arguments substantially different from those made by him in the poster case. In the poster case one primary issue is the absence of "evidentiary facts" to support Gilligan's material allegation that a conspiracy to defame existed prior to publication of the poster and that Farmer did acts which indicated participation by him in that conspiracy. See Silbowitz v. Lepper, 55 Misc. 2d 443, 285 N.Y. Supp. 2d 456 (Sup. Ct., N.Y. Co., Mangan, J.). In the present (slander) case, however, the main issues include (1) the absence of specific facts in the complaint concerning time, place, and context of the alleged utterances (the absence of which makes proper responsive pleading impossible) and (2) the absence of required "evidentiary facts" to show that Mr. Farmer (a) in fact uttered the alleged statements at a specific time and place and (b) that he actually (i) knew each statement to be false or (ii) knew that each statement was probably false and uttered it with reckless disregard of such known probable falsity.

Both of Farmer's motions to dismiss came before Justice Brust. But before he decided either of them, a decision was rendered by Justice Helman on the separate motion of Epton in the poster case. Notwithstanding the differences between the factual involvement of Epton and Farmer in the poster case and the resulting difference in the arguments presented by each and notwithstanding the complete factual and legal dissimilarity between the poster case and the slander case, Justice Brust denied both of Farmer's motions summarily and relied exclusively as the basis for his decision upon the related decision on the Epton motion in the poster case. There is no indication on the record that the court below was even aware of the glaring factual differences between the two motions before him and the one before his brother of the bench involving Epton.

It was patent error for the court below to dispose of defendant Farmer's motions in such a manner. To allow those decisions to stand will create serious questions involving due process of law and the process by which Farmer's motions were determined.

POINT TWO

APPELLEE'S BRIEF IGNORES COMPLETELY THE FACT THAT HE HAS FAILED TO PRODUCE AS REQUIRED BY LAW "EVIDENTIARY FACTS" TO SUPPORT THE MATERIAL ALLEGATIONS OF HIS COMPLAINT AND TO CORRECT DEFECTS OF REQUIRED SPECIFICITY IN THE COMPLAINT. APPELLEE SIMPLY ATTEMPTS TO CONFUSE THE MAIN ISSUE BY ALLEGING THAT APPELLANT HAS FAILED TO SUPPORT HIS SWORN DENIALS OF MATERIAL ALLEGATIONS WITH EVIDENCE THAT SUCH DENIALS ARE TRUE.

In a defamation action involving a public official, there is operative a strong public policy which is grounded in the principles of the First Amendment and which functions to encourage free and candid debate upon political issues, including the performance of controversial public servants. One function of that policy is to discourage suits by public officials who become angered at what they believe to be unjust, unfounded and untrue criticism and who feel that a well-publicized law suit is necessary to demonstrate that such criticism will not be taken lying down.

One specific legal consequence of that policy is that in order to maintain a defamation action against a critic where the critic-defendant makes an appropriate motion (as has been done in this case by appellant Farmer), the plaintiff public official must make a showing by the production of what have been called "evidentiary facts" that he can provide substantial admissible support for the material allegations of his complaint, including the necessary allegation that the allegedly defamatory utterances were made with "actual malice," i.e., (a) with knowledge of actual falsehood or (b) with knowledge of probable falsity and reckless disregard of such known probable falsity.

In the present case, as it involves defendant-appellant Farmer, there is a substantial, glaring and fatal failure of the plaintiff to produce in response to Farmer's motions to dismiss the following required "evidentiary facts": (a) facts to show the precise time, place and context of the alleged utterances (such information is alleged in the vaguest of conclusory terms in the complaint), (b) facts to show that Farmer actually knew that Gilligan did not murder James Powell, (c) (absent (b)) facts to show that Farmer possessed information demonstrating that Gilligan probably did not murder Powell and further facts to show that Farmer acted in "reckless disregard" of such knowledge of probable falsity, (d) facts to show that Farmer actually knew that Gilligan had not recently been treated for "mental" symptoms at a hospital treating "mental" patients, (e) (absent (d)) facts to show that Farmer possessed information indicating that the report received twice by Farmer's staff (that Gilligan was receiving treatment for mental or nervous symptoms in a Veteran's Hospital near his home) was probably untrue and that Farmer acted in reckless disregard of such known probable falsity. See Silbowitz v. Lepper, supra.

The operative test of "actual malice" for purposes of the New York Times case is not whether defendant disliked or even hated plaintiff or whether defendant actually wished him ill-fortune. The thrust of New York Times is against the use of statements known to be false or known to be probably false. Actual or imputed knowledge of untruth is the key element. If that element is absent, there is no triable issue of "actual malice" under New York Times, even if anger and ill-will are shown to be present.

Such a distinction makes excellent practical sense, for anger and animus cannot possibly be ruled out of political discourse, argument and commentary. Political adversaries will always harbor significant quantities of ill-will toward one another, and they will on occasion become angry at acts done or believed to have been done. What New York Times quite sensibly does is to say that critics of public officials are entitled under the First Amendment to a free hand, provided they do not use damaging statements of fact which are actually known to be false or which are of such a character that the critic knows or should know they are probably false. Where knowledge of probable falsity exists, a duty arises not to use ordinary care, but merely to avoid that degree of utter irresponsibility known as "recklessness."

In this case the required production of "evidentiary facts" to support the material allegations of the complaint has clearly not been made. For that reason, counsel for plaintiff should be asked whether or not such facts are at his disposal, and if they are not, this action should be dismissed.

POINT THREE

DEFENDANT-APPELLANT'S ARGUMENT BASED UPON "ASSUMTION OF RISK" IS PRESENTED IN COMPLETE SERIOUSNESS AND IN THE BELIEF THAT THERE IS SUBSTANTIAL MERIT TO THAT ARGUMENT. PLAINTIFF-APPELLEE HAS APPARENTLY FAILED EITHER TO UNDERSTAND OR TO APPRECIATE THAT ARGUMENT.

It is black-letter law supported by authorities cited in our main brief that where an occupation is undertaken with knowledge that certain risks of injury are necessarily involved in that occupation, then one who enters such an occupation voluntarily assumes certain of its risks and will not be permitted to bring suit if such an assumed risk causes him injury. That principle is well-established and not subject to serious question. The problem here is how that principle applies to the specific facts of the present two cases.

It is quite clear that if a baseball umpire gets hit in the leg and injured by a passed ball, he cannot sue the pitcher, the catcher, their team, or the owner of the ballpark. Similarly, if a hockey referee gets hit in the mouth by a flying puck, he, too, will be required to find redress for his injuries elsewhere than in the courts. By the same token, one who undertakes the occupation of teaching to the unskilled the art of driving an automobile is presumed to have assumed the risk of injury attributable to the reasonably-to-be-anticipated errors of the student driver.

Just as there are occupations in which certain physical risks are natural and inherent elements of the job, so also there are occupations in which certain intangible (but no less injurious) risks are a natural part of the job and are regarded as assumed by one who voluntarily takes on the job and gets paid for it. For example, the job of being President of the United States includes ultimate responsibility for its military actions. If unpopular military actions are taken, criticism of those actions is to be expected; and it is also to be expected that all critics will not be temperate in their language. Exaggeration commonly occurs when deep emotions are aroused over issues involving life and death. If someone in a fit of intemperate and irresponsible critical fervor calls the President a "murderer" because of his decisions on the war in Vietnam, such action should be regretted and vigorously criticized. But the President would not bring a slander suit against such a critic, and if he did the courts would dismiss it. Why? Because of the critic's right to Freedom of Speech under the First Amendment and also because it is simply unseemly and improper for such a suit to be brought, since a man who undertakes to act as President should expect much virulent criticism and should (both as a practical matter and as a matter of law) learn to live with it as best he can without resort to the courts.

Nor is the President the only "public official" who must be presumed as a matter of law to have assumed the risk of virulent and hostile criticism. A trial judge, for example, assumes with his office the risk of substantial anger and criticism not only from political opponents, but also from litigants, their relatives and friends. If a criminal court judge sentences a man to death for murder, and the mother or brother of the defendant is heard to exclaim that the sentence was not just and the judge is a "murderer," should the judge immediately commence a slander action? If he were so unwise and ill-advised as to do so, should his action not be dismissed upon "assumed risk" and First Amendment grounds?

A policeman does not sentence men to death, but he knows that as a necessary part of his occupation he may be called upon to kill them. Should his case be regarded as similar to or different from that of the President or a judge? Does a policeman enter his occupation any less voluntarily or with any less knowledge that his occupation is not universally popular and, indeed, is constantly the subject of unjust and unfounded criticism? Indeed, policemen as a class may be less popular and more generally criticized than presidents or judges.

Here we are concerned with an extremely limited fact situation which limits the issue before this Court. A police officer has killed a Negro boy under debatable factual circumstances. No conclusive evidence exists to show whether or not the homicide was justifiable on grounds of self-defense. It could have been murder. An intense public debate arose over that very question. The debate was in progress long before the statements in this case were allegedly made.

There has been no finding of fact by any official body on the circumstances of the Powell killing or of the mental process of Lieutenant Gilligan at the time. The failure of the Grand Jury to indict Gilligan simply indicates that the District Attorney did not present a case which would have convicted Gilligan beyond a reasonable doubt in the absence of rebuttal. The absence of action by the Police Review Board similarly indicates no positive vindication of Gilligan, but merely that proof of wrongdoing was not sufficiently strong to prevail. The existence of those proceedings does, however, indicate that evidence existed on both sides and that neither was beyond the realm of reasonable speculation.

Thus we have here only the question of whether criticism in the form of an implication of murder is an assumed risk of a policeman's occupation where the policeman has shot and killed someone in unclear circumstances.

The present argument is quite limited. A policeman may sue for defamation if he is accused wrongfully of persistent drunkenness, of taking bribes, of dishonesty or general incompetence, but, we contend, where he has shot and killed someone and no one knows exactly what the circumstances were, he cannot sue. This argument provides a state law ground for dismissal of this action, and avoidance of direct confrontation with the New York Times issue. We submit that in light of the New York Times and Garrison cases the law of defamation in New York should be modified or explained so that conflict with federal constitutional principles can be limited and the common law of New York can function smoothly without rubbing abrasively against the Federal Constitution.

CONCLUSION

For the reasons stated above and in the main brief of defendant-appellant James Farmer, the decision below should be reversed and the complaint ordered dismissed.

Respectfully submitted,

Dated: New York, N.Y.
February 26, 1968

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THOMAS R. GILLIGAN,

Plaintiff,

-against-

MARTIN LUTHER KING, JR., JAMES FARMER, CONGRESS OF RACIAL EQUALITY, a/k/a "CORE", JESSE GRAY, WILLIAM EPTON, MICHAEL CRENOVICK, TRI-LINE OFFSET CO., INC., PROGRESSIVE LABOR MOVEMENT and HARLEM DEFENSE COUNCIL,

Defendants.

Index No. 8437/1965

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that defendants, James Farmer and CORE--Congress of Racial Equality, Inc., hereby appeal to the Appellate Division of the Supreme Court for the First Judicial Department from the order of Mr. Justice Joseph A. Brust, made herein on October 29, 1965, and entered in the Office of the Clerk of the County of New York on November 1, 1965, denying said defendants' motion to dismiss the complaint pursuant to Rule 3211(a)(7) and (c) of the CPLR, and this appeal is taken from each and every part of said order as well as from the whole thereof.

January 17, 1965.

Yours, etc.,

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TO:
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CLERK OF THE COUNTY OF NEW YORK.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
- -x

THOMAS R. GILLIGAN,

Plaintiff-Respondent,

Index No.
15092/65

v.

JAMES FARMER and CONGRESS OF RACIAL
EQUALITY, INC.

Defendants-Appellants.

- -x

NOTE OF ISSUE

1. Notice of appeal served and filed January 17,1966.

2. Record on appeal was served and filed December 5, 1967.

3. This is an appeal from an order denying Defendants-Appellants' motion to dismiss the complaint on the grounds that the Plaintiffs -- Appellees, a public official, is entitled to a trial in a libel case on the issue of actual malice. The Defendants' - Appellants' urge that there are constitutional reasons as well as no actual malice as a matter of law.

4. This case is noticed for February 1968 term.

Dated New York, N.Y. December 29th, 1967.

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TO:
The Clerk of the Court, Appellate Division
Of the Supreme Court of the State of New York
First Department

Saxe, Bacon & Bolan
598 Madison Avenue
New York, N.Y.

SUPREME COURT, APPELLATE DIVISION

First Department, February 1968

Bernard Botein, P. J.,
Harold A. Stevens,
Samuel W. Eager,
Louis J. Capozzoli,
Owen McGivern, JJ.

- -

Thomas R. Gilligan, :
Plaintiff-Respondent,

vs. :

James Farmer and Congress of Racial Equality,
a/k/a "Core", 12874
Defendants-Appellants, :

and

Martin Luther King, Jr., Jessie Gray, William :
Epton, Michael Crenovick, Tri-Line Offset Co.,
Inc., Progressive Labor Movement and Harlem
Defense Council,
Defendants. :

- -

Appeal from order of the Supreme Court at Special Term (Brust, J.), entered November 1, 1965 in New York County, which denied a motion by defendants-appellants to dismiss the complaint.

Bradley R. Brewer of counsel (Denison Ray and Stephen Nagler with him on the brief; Bradley R. Brewer; Eugene G. Eisner; Carl A. Rachlin, attorneys) for appellants.

Lewis S. Sandler of counsel (Saxe, Bacon & Bolan, attorneys) for respondent.

Per Curiam:

In this appeal from an order denying a motion to dismiss a complaint sounding in libel, we agree with the dissenting Justice that there is nothing in plaintiff's affidavit tending to connect the individual defendant Farmer with the alleged defamation. While a majority of the court is of the opinion that the rule announced in New York Times Co. v. Sullivan (376 U.S. 254) is applicable to the case against the defendant Congress of Racial Equality (CORE), the present record does not justify summary determination of CORE's responsibility for the poster or, if it was responsible, of the issue of actual malice.

Accordingly, the order should be modified, on the law, to the extent of granting the motion as to defendant Farmer, and otherwise affirmed, without costs and without disbursements, with leave to defendant CORE to renew its motion, if so advised, after joinder of issue and completion of pre-trial disclosure procedures.

All concur except Stevens, J., who dissents
in a dissenting opinion

STEVENS, J. (Dissenting):

Defendants Farmer and Congress of Racial Equality, Inc. (CORE) appeal from an order entered November 1, 1965, which denied their motion to dismiss the complaint pursuant to CPLR 3211(a)(7) i.e., insufficiency, and (c) to have the motion treated as one for summary judgment. This is one of three appeals argued or submitted together. In two of the actions plaintiff seeks damages for libel and conspiracy. In the third action plaintiff seeks damages for slander. The underlying facts which gave rise to the incidents complained of are set forth fully in this dissent and only brief reference will be made to them in other writings.

This action is brought to recover monetary damages for an alleged libel and conspiracy. It is premised upon a poster which appeared on or about July 18, 1964. It is described as follows: "Wanted For Murder" printed above a picture of plaintiff in uniform, below which appeared "Gilligan, the cop, Lieut. Thomas Gilligan of the 14th Division", under which is drawn a line in the center of the poster, and below the line "Harlem Defense Council, 336 Lenox Ave., N.Y.C. Fi. 8-2254." The libel, if any, must be found in the juxtaposition of the words "Wanted For Murder" with the picture and identification of the plaintiff.

The incident which gave rise to the publication of the alleged libel as well as the alleged slander was a homicide which occurred July 16, 1964. Plaintiff, described as six feet two inches tall, weighing 200 pounds, who on several occasions allegedly had disarmed men with guns, while off duty shot and killed a boy, age 15, 5 feet 6-1/2 inches tall, who weighed 122 pounds. Accounts differ as to whether or not the boy was in possession of a knife with a three and one-half inch blade and whether or not he struck at the officer prior to the killing. Three shots were fired by the officer, two of which lodged in the boy's body, either one of which could have proved fatal.

Plaintiff in his complaint alleges he is a police lieutenant, and has been a policeman for seventeen years, during which time he has received one Exceptional Merit Award, three Accommodation Awards and ten Excellence Awards from the Police Department. He charges a conspiracy by these appellants and others to defame and injure him in his good name and reputation, and alleges upon information and belief they participated in the preparation and publication of the poster, above described, with actual malice and with reason to believe the words "Wanted For Murder" to be false. Plaintiff makes no other reference to homicide in his complaint though he does relate his version of the occurrence in his affidavit submitted in opposition to the motion to dismiss the complaint.

Farmer, who was then National Director and chief executive officer of CORE, and CORE moved to dismiss the complaint. In his affidavit in support of the motion Farmer stated flatly that neither he nor CORE was, or ever had been, a member of or affiliated with either the Harlem Defense Council or the Progressive Labor Movement. Farmer denied participation in any conspiracy by himself or CORE, and in fact that he had ever even heard of plaintiff prior to July 16, 1964. Farmer denied that he or CORE had anything to do with the preparation or publication of the poster, had ever been consulted about it before publication or knew of its existence prior to completion and circulation. Farmer denied the existence of a policy by himself or CORE to injure plaintiff, or even that he, up to the date of his affidavit (September 10, 1965), knew who printed the poster or arranged for its circulation.

In opposition to the motion to dismiss, plaintiff alleges he commenced this action against Farmer and CORE following the appearance of the poster. This despite the fact that neither the name of Farmer nor of CORE appears on the poster. Plaintiff asserts his ground for the conspiracy charge "is based on the fact that when various news media interviewed persons carrying the placards, or distributing the handbills [above described] . . . many of these persons indicated they were acting as members of the Congress of Racial Equality, Inc." No attempt is made to identify the news media or the persons interviewed, nor is it asserted that Farmer or CORE authorized such persons, whoever they were, to appear for or represent either Farmer or CORE.

In the succeeding paragraph of his affidavit plaintiff asserts "I have no personal knowledge, however, of the exact extent to which the defendants James Farmer and the Congress of Racial Equality, Inc. participated in the conspiracy, as this information is exclusively within the knowledge of these defendants." The conclusion is irresistible that plaintiff merely cast his lawsuit net into the sea of civil rights workers and organizations hoping, willy-nilly, to snare them in its mesh.

In a motion pursuant to CPLR 3211(c) "either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment" (emphasis supplied). Both parties submitted affidavits on the motion below. Under such circumstances it was incumbent upon the plaintiff to come forward with some evidentiary fact tending to support the charges made in his complaint. This he has failed to do and the motion to dismiss should have been granted. To permit continuance of the action against these appellants upon the bare possibility or hope that plaintiff prior to trial may, in some fashion or manner, discover something which might give colour or support to his claim is to unfairly penalize these appellants and unduly impose the further expense of possible protracted litigation. When the accuracy of a pleading is challenged pursuant to CPLR 3211(c) by matters dehors the pleading, the assumption that the facts occurred as stated in the pleading no longer obtains. CPLR 3211(c) authorizes what is termed a "speaking" motion. When used such motion may test the truth and factual content of the pleading to which it is addressed (see, 4 Weinstein-Korn-Miller, §§3211.43, 3211.44, 3211.49 et seq.). While the statute vests discretion in the court as to whether the motion shall be treated as one for summary judgment, this case, in my view, warrants such treatment and I would dismiss the complaint.

Since the issue of defamation is common to each of the three appeals, and all have their genesis in the homicide of July 16, 1964 - at least as the inspirational or causal factor - some aspects of the law of defamation are discussed. Initially the possible status of plaintiff as a public official or a public figure, or both, should be considered.

As a lieutenant plaintiff is a member of the hierarchy of police officialdom, vested with certain discretionary powers. His duties generally are of a public character involving protection of the citizenry. His employer, the municipality, may be liable for plaintiff's acts of misconduct or negligence when committed within the scope of the performance of his official duties. The public, which bears the expense of maintaining a police department, may rightfully be concerned with the operation of its police department. Plaintiff, having achieved a position of responsibility, can expect his official conduct to be subject to public scrutiny and public criticism. Plaintiff is a public official, or at least a public officer (Penal Law §1055), much decorated, each award, presumably, having been attended by some ceremony. He had become newsworthy and was also somewhat of a public figure. When he killed Powell on July 16, 1964, the attendant circumstances immediately projected him further into the spotlight and he became, if not before, a public figure (cf. Associated Press v. Walker, 388 U. S. 130).

As was noted in an earlier case (Carl Fischer Rogow, Inc. v. Ally, Inc., et al., Appeal #12804), "[t]he court is not bound to take judicial notice of matters of fact. However, it may and frequently does so where 'the nature of the subject, the issue involved and the apparent justice of the case' (Hunter v. N.Y.O. & W.R.R. Co., 116 N. Y. 615, 621) so dictate." Judicial notice is taken that the killing of Powell aroused a storm of protest in large segments of the community, while others either approved of the act or were silent. Hardly anyone was indifferent. Sensing this, the District Attorney of the County of New York took the very unusual step of releasing the result of his investigation by making a public report in September 1964.

Persons who might have disapproved of the killing or critically questioned the alleged surrounding circumstances are not afforded total immunity for any and all speech or publications. Plaintiff, as a public official and a public figure, is allowed to recover if he is libelled. He must show, however, that the libel was the result of actual malice, that is, with knowledge that it was false or with a reckless disregard of whether it was false or not (see, New York Times Company v. Sullivan, 376 U. S.254, 280; cf. Jacobowitz v. Posner, 28 A D 2d 706, affd. 21 N Y 2d ___, dec.April 4, 1968.) If the official conduct of a police official is immune to critical appraisal or public disapproval he becomes a preferred member of society. Public opinion, which is the most effective check of official abuse, can never be aroused and any and all acts of such official are protected either by a veil of secrecy or the critic is subjected to costly litigation. The right of fair and free comment is essential to society's well-being. Here plaintiff's justification or immunity from punishment is founded, in part, upon his classification of "police officer" (Penal Law §1055).

It is doubtful had plaintiff been referred to as a "killer" that there would have been any cause of action. The term would have been legally accurate. Only a possible connotation could have rendered it objectionable. Here a homicide occurred and a homicide is defined as "the killing of one human being by the act, procurement or omission of another" (Penal Law §1042). Thus, one who kills another, with or without justification, may be termed a "killer." Murder, of course, involves a homicide which is neither excusable nor justifiable. It is doubtful that the public mind is aware of the fine distinction.

The publication of the poster followed close on the heels of the homicide. It is doubtful that even the District Attorney had commenced or made substantial progress into any investigation. Various accounts of the killing by alleged eyewitnesses circulated freely. The individual conclusion depended upon the account accepted. Unless the conclusion represented by the poster could not reasonably have been drawn from the facts then available, or ascertainable after reasonable investigation, or the inference was one no fair-minded person could draw, a charge of libel cannot be sustained without proof of actual malice. Even an official investigation did not establish the fact of falsity.

A reasonable basis, or at the very least, probable cause for use of the term "murder" is shown by the fact that substantial segments of the community differed as to whether the homicide was murder or self-defense, i.e., justifiable homicide (Penal Law §1055). Nor can it be concluded that the expression as an expression of opinion, represented an inference which no fair-minded person could draw, under the circumstances, from the undisputed facts.

The report of an extensive investigation undertaken by the District Attorney of New York County was released in September 1964. The report included differing versions by persons who, allegedly, were eyewitnesses to some if not all of the events which culminated in the killing. According to the report there were no smoke, flame or powder marks on the body and no powder burns or scorch marks on the clothing. If the eyewitnesses could differ to the extent, depending upon the version accepted, that the homicide could be justifiable or unjustifiable, certainly a non-witness could reasonably have concluded, initially, from available accounts that it was murder. Although no indictment was returned, the report neither conclusively established self-defense nor negated it.

A failure to indict is not an acquittal of a charge. It merely establishes that the Grand Jury concluded there was insufficient evidence before it which, if unexplained or uncontradicted, would warrant conviction by a trial jury (Code of Criminal Procedure §251) and does not bar resubmission (supra, §270).

Again, it should be emphasized that neither Farmer's name nor that of CORE appears upon the poster. Nothing beyond a bare allegation upon information and belief, the sources of the information and the basis for the belief not being indicated when challenged, and a vague reference to various media and unidentified persons even attempts to bind them. There is absolutely nothing in this record from which malice with respect to these appellants could even reasonably be inferred (cf. Shapiro v. Health Insurance Plan, 7 N Y 2d 56). Mere carelessness or negligence, if it could be shown, which I doubt, is not malice. Nor has plaintiff come forward with a single evidentiary fact to show or establish a conspiracy in which these appellants were involved.

For the foregoing reasons I dissent, and vote to reverse and dismiss the complaint.

Botein, P.J., Stevens, Eager, Capozzoli and McGivern, JJ.

12875

Thomas R. Gilligan,
Plaintiff-Respondent, L.S. Sandler

against

James Farmer and Congress of Racial
Equality, Inc., also known as "CORE",
Defendants-Appellants. B.R. Brewer

Order entered November 1, 1965, denying motion to dismiss the complaint, sounding in slander, affirmed, without costs or disbursements, with leave to defendants-appellants to renew the motion, if so advised, after joinder of issue and completion of pre-trial disclosure procedures. While a majority of the court are agreed that the rule announced in New York Times Co. v. Sullivan (376 U.S. 254) is applicable to this case, the present record does not lend itself to summary disposition of the issue of actual malice.

All concur except Stevens, J., who dissents in the following memorandum:

STEVENS, J. (dissenting):

I agree with the majority that New York Times Co. v. Sullivan (376 U.S. 254) is applicable. However, I would reverse and dismiss the complaint. Here, as in the companion appeal decided herewith (appeal #12874) the motion to dismiss is made pursuant to CPLR 3211(a)(7) and (c). As in such appeal I would treat this motion as a motion for summary judgment also. Plaintiff alleges upon information and belief that the statements complained of were made by defendant Farmer. Farmer does not here make a specific denial but merely asserts he has no recollection of making such statements. However, Farmer does set forth at length the detailed investigation made by him or at his instigation, the report of the District Attorney, the content of the unidentifiable phone calls, the transmission of such information to the office of the District Attorney, defendant's attempt to check its accuracy and the refusal of the police to permit an interview with plaintiff. All of this would seem to negative any contention that the statements, even if made, were made with knowledge of their falsity or with reckless disregard of their truth. (See Schneph v. New York Post Corporation, 23 A.D.2d 822, aff'd. 16 N.Y.2d 1011.) Plaintiff does not identify the source of his information as to the making of these statements nor does he set forth the basis for his belief. This is insufficient. In light of the public and social interests here involved, the various points of genuine controversy as to the nature of the act from which sprang the expression of opinion, and the very legitimate interest of defendant in the issues, such statements, if made, would not support the charge of slander. (Jacobowitz v. Posner, 28 A D 2d 706, affd. 21 N.Y.2d ____, decided April 4, 1968.)

Order filed.

Botein, P.J., Stevens, Eager, Capozzoli and McGivern, JJ.

12873

Thomas R. Gilligan,
Plaintiff-Respondent, L.S. Sandler

against

Martin Luther King, Jr., et al.,
Defendants,

and

William Epton,
Defendant-Appellant. S. Fingerhood

Order entered October 27, 1965, denying motion of defendant-appellant William Epton to dismiss the complaint, sounding in libel, unanimously affirmed, without costs or disbursements, with leave to renew the motion, if defendant-appellant is so advised, after joinder of issue and the completion of pre-trial disclosure procedures. While a majority of the court are agreed that the rule announced in New York Times Co. v. Sullivan (376 U.S. 254) is applicable to this case, the present record does not lend itself to summary disposition of the issue of actual malice.

All concur. Stevens, J., concurs in the following memorandum:

STEVENS, J. (concurring):

I concur. The motion here is pursuant to CPLR 3211(a)(7) only. Since the basis of plaintiff's action lies in a claimed injury to his character in the opinion of others, pre-trial disclosure proceedings might well involve examination of plaintiff as to whether and under what circumstances plaintiff has ever been involved in other homicides, and what, if any, public reaction was manifested in connection therewith.

Order filed.

Botein, P.J., Stevens, Eager, Capozzoli and McGivern, JJ.

12874

Thomas R. Gilligan,
Plaintiff-Respondent, L.S. Sandler

against

James Farmer and Congress of Racial
Equality, a/k/a "CORE",
Defendants-Appellants. B.R. Brewer

Order entered on November 1, 1965, modified, on the law, to the extent of granting the motion as to defendant James Farmer, and, as so modified, affirmed, without costs or disbursements, with leave to defendant Congress of Racial Equality to renew its motion, if so advised, after joinder of issue and completion of pre-trial disclosure procedures. Opinion Per Curiam. All concur except Stevens, J. who dissents in an opinion.

Order filed.

New York Supreme Court

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

THOMAS R. GILLIGAN,
Plaintiff-Respondent,
—against—

JAMES FARMER AND CONGRESS OF RACIAL EQUALITY, a/k/a "CORE",
Defendants-Appellants,
—and—

MARTIN LUTHER KING, JR., JESSIE GRAY, WILLIAM EPTON, MICHAEL CRENOVICK, TRI-LINE OFFSET CO., INC., PROGRESSIVE LABOR MOVEMENT AND HARLEM DEFENSE COUNCIL,
Defendants.

RECORD ON APPEAL

SAXE, BACON & BOLAN
Attorneys for Plaintiff-Respondent
598 Madison Avenue
New York, N. Y. 10022
PL 2-6100

DENISON RAY
Attorney for Defendants-Appellants
1 Chase Manhattan Plaza
New York, N. Y. 10005
HA 2-3000

TABLE OF CONTENTS

PAGE

Statement Under CPLR 5531 1

Notice of Appeal 3

Memorandum of Decision 4

Order Appealed From 5

Papers Read in Support of Motion:

Notice of Motion 6

Complaint 8

Exhibit A thereto 13

Affidavit of James Farmer 14

Papers Read in Opposition to Motion:

Affidavit of Thomas R. Gilligan 19

Affidavit of Frank S. Polestino 22

Opinions 25

Stipulating Waiving Certification 32

Notice of Appeal

SUPREME COURT OF THE STATE OF
New York

COUNTY OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that delendants, James Farmer and CORE—Congress of Racial Equality, Inc., hereby appeal to the Appellate Division of the Supreme Court for the First Judicial Department from the order of Mr. Justice Joseph A. Brust, made herein on October 29, 1965, and entered in the Office of the Clerk of the County of New York on November 1, 1965, denying said defendants' motion to dismiss the complaint pursuant to Rule 3211(a)(7) and (c) of the CPLR, and this appeal is taken from each and every part of said order as well as from the whole thereof.

January 17, 1965.

Yours, etc.,

DENISON RAY,
Attorney for Defendants James Farmer and Congress of Racial Equality,
1 Chase Manhatan Plaza,
New York, N. Y. 10005

To:
SAXE, BACON & BOLAN,
Attorneys for Plaintiff,
598 Madison Avenue,
New York, N. Y. 10022.
CLERK OF THE COUNTY OF NEW YORK.

Memorandum of Decision

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

Special Term—Part I

Present:

Hon. Joseph A. Brust, *Justice.*

[SAME TITLE]

The following papers numbered 1 to 7 read on this motion Submitted No. 167 on Calendar of October 7, 1965;

	Numbered Papers
Notice of Motion—exhibits and Affiidavits Annexed	1 to 5
Answering Affidavit	6 to 7

Upon the foregoing papers this motion is disposed of in accordance with decision in companion motion filed simultaneously herewith.

Filed
November 1, 1965
New York
County Clerk's Office

J. A. B.
J. S. C.

Dated October 7, 1965
County Clerk's No. 8437, 1965
Spec I Liber 686 Line 1, 1965

Order Appealed From

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SPECIAL TERM PART I—INDEX NO. 15092/65

Present:

HON. JOSEPH A. BRUST, *Justice.*

[SAME TITLE]

The following papers numbered 1 to 5 used on this motion, submitted this 7th day of October, 1965.

Calendar No. 166

	Papers Numbered
Notice of Motion and Affidavits Annexed ..	1 to 4
Answering Affidavits	5

Upon the foregoing papers this motion under calendar number 166 and 167 of October 7, 1965, are consolidated herein and disposed of together. Both motions to dismiss the complaint for legal insufficiency are denied, in view of the recent decision of Mr. Justice Helman, dated October 27 1965, and for the reasons stated therein, which upheld the sufficiency of the complaint.

FILED
November 1, 1965
New York
County Clerk's Office

Dated October 29, 1965
County Clerk's No. 15092/65

J. A. B.
J. S. C.

Notice of Motion

SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of James Farmer, sworn to on the 10th day of September. 1965, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a Special Term, Part I thereof, to be held at the Court House at 80 Centre Street Borough of Manhattan, City and State of New York, on the 5th day of October 1965 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order dismissing the complaint pursuant to Rule 3211(a)(7) and (c) of the CPLR upon the ground that the complaint fails to state a cause of action, and for such other and further relief as to this Court may seem just and proper.

Please take further notice that answering papers, if any, shall be served at least five days prior to the return date of this motion.

September 15, 1965.

Yours, etc.,

Denison Ray,
Attorney for Defendants James Farmer
Farmer and Congress of Racial
Equality,
1 Chase Manhattan Plaza,
New York, New York 10005.
HA 2-3000

To:

Saxe, Bacon & Bolan,
Attorneys for Plaintiff,
598 Madison Avenue,
New York, New York 10022.

Verified Complaint

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[SAME TITLE]

Plaintiff, complaining of the defendants by his attorneys, Saxe, Bacon & Bolan, alleges:

1. At all times hereinafter mentioned, plaintiff was and now is a resident of the State of New York.

2. Upon information and belief, at all times hereinafter mentioned, the defendant, Martin Luther King, Jr., was and still is a resident of the State of Georgia.

3. At all times hereinafter mentioned, the defendant, James Farmer, was and still is a resident of the State of New York and is National Director of defendant, Congress of Racial Equality, also known as and hereinafter referred to as CORE.

4. Upon information and belief, at all times hereinafter mentioned, the defendant, CORE was and now is a corporation duly organized and existing under the laws of the State of New York, with offices in the City, County and State of New York.

5. At all times hereinafter mentioned, the defendant Jessie Gray was and now is a resident of the State of New York.

6. Upon information and belief, at all times hereinafter mentioned, the defendant, William Epton was and still is a resident of the County, City and State of New York and Chairman of the defendant, Progressive Labor Movement and a member of the defendant Harlem Defense Council.

7. Upon information and belief, at all times hereinafter mentioned, the defendant, Michael Crenovick was and still is a resident of the County, City and State of New York, and President of defendant, Tri-Line Offset Co., Inc.

8. Upon information and belief, the defendant, Tri-Line Offset Co., Inc., is a domestic corporation, organized and existing under the laws of the State of New York and with an office for doing business in the County, City and State of New York.

9. Upon information and belief, at all times hereinafter mentioned, the Progressive Labor Movement is a voluntary unincorporated association, duly organized and existing under the laws of the State of New York with an office for doing business in the County, City and State of New York.

10. Upon information and belief, at all times hereinafter mentioned, the defendant, Harlem Defense Council was and now is a subsidiary under the control and direction of the Progressive Labor Movement with an office for doing business in the County, City and State of New York.

11. Plaintiff, at all times hereinafter mentioned, was and still is a Police Lieutenant in the Police Department of the City of New York, and has been a policeman for the last seventeen (17) years, during which time plaintiff

has received one (1) Exceptional Merit Award; three (3) Accommodation Awards; Seven (7) Meritorious Awards and ten (10) Excellence Awards from the Police Department of the City of New York.

12. Prior to the time complained of herein, plaintiff enjoyed an outstanding and excellent reputation for competency, intelligence, honesty, integrity and valor both as a man and as a policeman in the Police Department of the City of New York.

13. Since in or about July, 1964, the defendants conspired and maliciously and wilfully participated in a plan and course of action designed to defame and injure the plaintiff in his good name and reputation; in his profession as a policeman; to destroy his income and livelihood and to remove plaintiff as a police officer of the Police Department of the City of New York.

14. In pursuance of the said conspiracy and plan, and on or about the 18th day of July, 1964, defendant, Harlem Defense Council published, and upon information and belief, the defendants, King, Farmer, Core, Gray, Epton, Crenovick, Tri-Line Offset Co., Inc., and Progressive Labor Movement, participated in the preparation and publication of the following false, scandalous, derogatory, infamous, malicious and libelous article, placard, poster or handbill, of and concerning the plaintiff, a copy of which is annexed hereto, marked Exhibit A and made part hereof:

WANTED
FOR
MURDER
[A Picture of Plaintiff in his
New York Police uniform]

Gilligan, the Cop
Lieut. Thomas Gilligan of
the 14th Division

Harlem Defense Council
336 Lenox Ave., N. Y. C.
Fi. 8-2254

15. That the said words on the placard, poster or handbill, "Wanted For Murder" was published by defendants with reason to believe the same to be false and with actual malice toward plaintiff pursuant to a previously existing policy on the part of defendants, and with the intent and for the purpose of exposing plaintiff to hatred, contempt, ridicule and aversion and to injure and dishonor him in his character as a man and in his capacity as a policeman for the Police Department of the City of New York.

16. That defendants, their servants, agents and employees wrongfully, negligently and carelessly failed and omitted to make investigation as to the truth of the said statement "Wanted For Murder" prior to the printing, publication and circulation thereof and the same was printed, published and circulated by defendants as aforesaid unlawfully and in wanton and reckless disregard of the plaintiff's rights.

17. That by the printing, publication and circulation of the aforesaid false and defamatory placard, poster or handbill, "Wanted For Murder", defendants did intend to convey that plaintiff had committed the crime of murder and expose the plaintiff to hatred, contempt, ridicule and aversion and to impugn his character, reputation, ability and standing as a man and in his capacity as a policeman in the Police Department of the City of New York.

18. By reason of the publication as aforesaid, plaintiff has been injured in his good name, character and reputation both as a man and as a policeman and in his feelings, mind and body and has been held up to ridicule and contempt by his friends, acquaintances and the public and that his ability and standing as a man and as a policeman have been irreparably injured; and that the said publication has induced an evil opinion of said plaintiff in the minds of the public all to his damage in the sum of $3,750,000.00.

WHEREFORE, plaintiff demands judgment against these defendants in the amount of $3,750,000.00, together with costs and disbursements of this action.

SAXE, BACON & BOLAN
Attorneys for Plaintiff
Office & P. O. Address
598 Madison Avenue
New York, New York 10022

[Verified May 24, 1965 by Thomas R. Gilligan.]

Verified Complaint

EXHIBIT A, ANNEXED TO COMPLAINT

WANTED FOR MURDER

GILLIGAN, THE COP

Lieut. Thomas Gilligan of The 14th Division

HARLEM DEFENSE COUNCIL
336 Lenox Ave. N.Y.C.
FI-8-2254

Affidavit of James Farmer In Support of Motion to Dismiss The Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

JAMES FARMER, being duly sworn, deposes and says:

1. I am one of the defendants in the above-entitled action. I am also National Director and chief executive officer of CORE—Congress of Racial Equality, Inc. (designated above as Congress of Racial Equality, Inc. a/k/a "CORE"), another defendant herein. I have personal knowledge of the activities of CORE in connection with the shooting of James Powell by plaintiff. I make this affidavit in support of my motion and that of CORE to dismiss the complaint for failure to state a cause of action.

2. I have studied the complaint in this case. It accuses, the defendants, including myself and CORE, of defaming plaintiff and of conspiring to defame plaintiff by virtue of the preparation, printing, publication and circulation of a poster (alternatively referred to as an article, placard and handbill) which is attached to the complaint as Exhibit A and which shows plaintiff's picture along with the words "Wanted For Murder", "Gilligan, The Cop" and "Lieut. Thomas Gilligan of the 14th Division". The

poster also bears the words "Harlem Defense Council, 336 Lenox Ave. N. Y. C. FI 8-2254" in such manner as to appear to have been disseminated by that organization. The Harlem Defense Council is also named as a defendant in this action.

3. In particular I note the following allegations in the complaint:

(a) Paragraph 10 claims that defendant Harlem Defense Council is a subsidiary of and under the control and direction of the Progressive Labor Movement, also a defendant herein.

(b) Paragraph 13 alleges that since July 1964 "the defendants conspired and maliciously and wilfully participated in a plan and course of action designed to defame and injure the plaintiff in his good name and reputation" and to otherwise injure plaintiff in the ways enumerated in that paragraph.

(c) Paragraph 14 contends that "in pursuance of the said conspiracy and plan, and on or about the 18th day of July, 1964, defendant HARLEM DEFENSE COUNCIL published, and upon information and belief, the defendants, . . . FARMER, CORE, [and the other named defendants] . . . participated in the preparation and publication of the . . . [aforementioned] poster".

(d) Paragraph 15 asserts that said poster "was published by defendants . . . pursuant to a previously existing policy on the part of defendants" to defame, injure and dishonor plaintiff.

(e) Paragraphs 16 and 17 claim, among other things, that defendants printed, published and circulated the poster.

4. To the extent that each of the foregoing allegations of the complaint concern myself and Core, they are totally untrue. Specifically:

(a) Neither Core nor I is now and never has been a member of or affiliated with either the Harlem Defense Council or the Progressive Labor Movement.

(b) Neither Core nor I has ever conspired with the other defendants or participated in any plan or course of action to defame or otherwise harm plaintiff. To the contrary, I had never even heard of plaintiff until July 16, 1964. Thereafter, as will be explained more fully below, whatever statements I made were not in concert with anyone else but were made independently of any other person or organization (other than Core).

(c) Neither Core nor I had anything to do with the preparation and publication of the poster which is Exhibit A to the complaint. I never saw the poster until sometime after July 18, 1964, the alleged date of publication; nor was I or Core consulted about the poster in advance of its publication nor were we asked to give our approval or advice in connection therewith. In fact, neither Core nor I ever knew of the poster's existence until after it was completed and in circulation.

(d) At no time, whether before or after July 18, 1964 (the date of publication of the poster, according to plaintiff), was there any "existing policy" on the part of the defendants in this case to injure plaintiff. As will be described more fully below, I did attempt, independently of any other person or organization save Core, to investigate the events in which plaintiff killed a Negro boy and to thereafter give my opinion as to those events, which were matters of grave public concern, but my efforts were not in concert with the other defendants herein nor did they include the publication of the poster in question.

(e) I not only did not assist in the preparation or publication of the poster, nor did Core, but neither I nor my organization had anything to do with the printing or circulation of the poster. To this day I have no personal knowledge of who printed the poster or what arrangements were made for its circulation.

5. In short, I never had anything to do with the poster nor did Core nor did I ever authorize Core or its representatives to assist in any way whatsoever with its preparation, printing, publication or circulation.

6. On July 16, 1964, plaintiff, a lieutenant in the New York City Police Department, shot and killed James Powell, a Negro boy who was 15 years of age. The killing was widely reported in the newspapers and on radio and TV and was the subject of much controversy and dispute because it seemed to many persons including some eye-witnesses, that the killing was completely unjustified.

7. As the National Director of CORE, an interracial organization dedicated to the attainment of equality for

Negroes and which has long been concerned with the problem of discrimination against Negroes by the police of New York City, I directed representatives of CORE to conduct an investigation into the killing. Based upon the results of that investigation and upon the various public reports about the killing, I made statements in July 1964 and thereafter concerning the killing and the broader implications of police discrimination against Negroes and the necessity for a Civilian Review Board to consider the charges of improper police conduct.

8. However, at no time did any of my statements or those of CORE take the form of the poster in question or anything remotely resembling it. At no time did the other defendants and myself discuss or agree upon any policy or plan to defame or otherwise injure plaintiff and we certainly did not discuss together or jointly agree to the preparation, printing, publication or circulation of the poster at issue. Indeed, it appears that plaintiff, for motives best known to him, has arbitrarily named as defendants a number of prominent civil rights leaders in New York City and the nation.

9. It is, therefore, respectfully requested that this Court grant this motion and dismiss the complaint as against myself and CORE.

(Sworn to September 10, 1965 by James Farmer.)

Affidavit of Thomas R. Gilligan, Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

THOMAS R. GILLIGAN, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action and make this affidavit in opposition to the defendants'—James Farmer and the Congress of Racial Equality, Inc.—motion to dismiss the complaint pursuant to CPLR Rule 3211(a)(7), for legal insufficiency.

2. I am a Police Lieutenant in the Police Department of the City of New York and have been employed as a policeman for the past seventeen years.

3. On the morning of July 16, 1964, while off duty and in civilian clothes, I was at a radio and T.V. repair shop located at East 72nd Street between Second and Third Avenues, in the Borough of Manhattan. I heard some commotion on the street. I went into the street. I saw one James Powell with an open-blade knife running into a building after a man. I identified myself as a Police Lieutenant, flashing my badge and revolver. James Powell came after me with a knife in his hand. I ordered him to stop and I fired a warning shot, but James Powell kept coming.

Then, in self-defense, I fired my revolver and killed James Powell.

4. That on or about the 18th day of July, 1964, a poster, placard or handbill containing a photograph of me in my police uniform and the words "WANTED FOR MURDER" was published and circulated.

5. I thereafter commenced the instant defamation action, alleging that the defendants James Farmer and the Congress of Racial Equality, Inc. did conspire with the other defendants in a plan or scheme to defame me by preparing, publishing and circulating the aforementioned poster, placard or handbill.

6. My assertion that the defendant James Farmer and the Congress of Racial Equality, Inc. were part of the conspiracy is based on the fact that when various news media interviewed persons carrying the placards, or distributing the handbills containing a photograph of me in my police uniform and the words "WANTED FOR MURDER", many of these persons indicated that they were acting as members of the Congress of Racial Equality, Inc.

7. I have no personal knowledge, however, of the exact extent to which the defendants James Farmer and the Congress of Racial Equality, Inc. participated in the conspiracy, as this information is exclusively within the knowledge of these defendants.

8. I am informed by my attorneys and verily believe that under these circumstances the defendants'—James

Farmer and the Congress of Racial Equality, Inc.—motion should be denied.

WHEREFORE it is respectfully requested that the defendants—James Farmer and the Congress of Racial Equality, Inc.—motion pursuant to the CPLR Section 3211(a) (7), be in all respects denied.

[Sworn to October , 1965 by Thomas R. Gilligan.]

Affidavit of Frank S. Polestino, Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

[SAME TITLE]

State of New York }
County of New York } ss.:

Frank S. Polestino, being duly sworn, deposes and says:

I am an attorney duly admitted to practice in the State of New York and I am associated with the firm of Saxe, Bacon & Bolan, attorneys for the plaintiff and submit this in opposition to the defendants' James Farmer and the Congress of Racial Equality, Inc.'s motion pursuant to Civil Practice Law and Rules Rule 3211(a)(7).

I am fully familiar with all the facts and circumstances hereinafter set forth and have persnoal knowledge thereof.

In substance this action was brought against the defendants including James Farmer and the Congress of Racial Equality, Inc. for conspiring to defame the plaintiff in that pursuant to a plan or scheme the defendants prepared, printed, published and circulated a poster, placard or handbill containing a photograph of the plaintiff in his police uniform and the words "Wanted For Murder."

Although the defendant, James Farmer, and the Congress of Racial Equality, Inc. by the instant application seek a dismissal of the complaint for legal insufficiency, they have submitted the affidavit of the defendant James Farmer. This affidavit made on behalf of the defendant James Farmer individually as well as in behalf of the defendant Congress of Racial Equality, Inc. of which the defendant, James Farmer, is the Chief Executive Officer merely denies that the defendants James Farmer and the Congress of Racial Equality, Inc. conspired with the other defendants in preparing, printing, publishing or circulating the poster placard or handbill complained of in this case or of participating in any way with the other defendants in the preparation, printing, publication or circulation of said poster, placard or handbill. It is solely on the basis of this denial that the defendants James Farmer and the Congress of Racial Equality, Inc. seek a dismissal of the complaint.

The plaintiff in an affidavit submitted in opposition to the instant motion has indicated that he is without personal knowledge of the exact extent of the defendants' James Farmer and the Congress of Rocial Equality, Inc. participation in the conspiracy since this information is exclusively within the knowledge of the aforementioned defendants. However, plaintiff does assert that to his knowledge the defendants James Farmer and the Congress of Racial Equality, Inc. were part of the conspiracy in that many persons carrying placard or distributing handbills when interviewed by news media indicated they were members of and acting for the Congress of Racial Equality, Inc.

Inasmuch as affidavits have been submitted, the instant motion must be considered a motion for summary judgment. (Civil Practice Law and Rules, Rule 3211(c)).

Affidavit of Frank S. Polestino, Read in Opposition to Motion

Conspiracies by their nature are usually entered into in secret and thus the essential facts with regard thereto are generally exclusively within the knowledge of the conspiring parties (cf *Bedard* v. *LaBrier*, 20 Misc. 2d 614).

The rule is that summary judgment should not be granted if the essential facts involved are apparently exclusively within the knowledge of one of the parties, and the other party does not and cannot controvert the factual assertions of the party with knowledge. (*Mosher* v. *Rowland Distributors, Inc.*, 15 A. D. 2d 934; *O'Neil* v. *Kappesser*, 40 Misc. 2d 848; *Nigrelli* v. *Anderson*, 202 N. Y. 2d 484).

Since the essential facts with regard to the conspiracy here are aparently exclusively within the knowledge of the defendants James Farmer and the Congress of Racial Equality, Inc., the instant motion should be denied.

WHEREFORE, it is respectfully requested that the defendants motion pursuant to Civil Practice Law and Rules, Rule 3211 (a)(7) be in all respects denied.

(Sworn to October 4, 1965 by Frank S. Polestino.)

SUPREME COURT
NEW YORK COUNTY
SPECIAL TERM—PART I

[SAME TITLE]

BRUST, *J.*:

Motion is disposed of in accordance with decision in companion motion filed simultaneously herewith.

[GILLIGAN v. FARMER]

BRUST, *J.*:

Motions under calendar numbers 166 and 167 of October 7, 1965, are consolidated herein and disposed of together. Both motions to dismiss the complaint for legal insufficiency are denied in view of the recent decision of Mr. Justice Helman, dated October 27, 1965, and for the reasons stated therein, which upheld the sufficiency of the complaint.

[GILLIGAN v. MARTIN LUTHER KING, JR., *et al*]
48 Misc. 2d 212

HELMAN, *J.*:

This is a motion by defendant Epton to dismiss the complaint for failure to state a cause of action.

Plaintiff is a Police Lieutenant in the New York City Police Department. He avers that on July 16, 1964, while off duty and in civilian clothes, at East 76th Street, in the Borough of Manhattan, City of New York, he heard a commotion on the street; that he saw the deceased with an open blade pursuing a person running into a building; that he identified himself as a Police Lieutenant, flashing his badge and revolver; that deceased came after him with a knife in his hands; that he advised him to stop and fired a warning shot, but the deceased kept coming; then, in self-defense, he fired his revolver, killing the deceased.

The complaint alleges plaintiff enjoyed an outstanding and excellent reputation and good character; that defendants since in or about July, 1964, conspired and maliciously and willfully participated in a plan and course of action designed to defame and injure the plaintiff in his good name and reputation, in his profession as a policeman; to destroy his income and livelihood and to remove plaintiff as a police officer of the New York City Police Department; that on or about July 18, 1964, the defendant Harlem Defense Council published, and upon information and belief the other defendants participated in, the preparation and publication of a false, scandalous, derogatory, infamous, malicious and libelous article, poster or handbill, of and concerning plaintiff.

The said poster is alleged to be a picture of plaintiff in a police uniform, above which are the words: "Wanted for Murder", and underneath the picture plaintiff is identified as "Gilligan, the cop", followed by the words "Lieut. Thomas Gilligan of the 14th Division." Underneath is printed Harlem Defense Council with an address and telephone number.

The complaint further alleges that the words "Wanted for Murder", were published by defendants with reason to believe the same to be false and with actual malice toward plaintiff, pursuant to a previously existing policy on the part of defendants and with the intent and for the purpose of exposing plaintiff to hatred, contempt, ridicule and aversion and to injure and dishonor him both as a man and as a policeman; and that the publication intended to convey that plaintiff had committed the crime of murder; that defendants wrongfully, negligently and carelessly failed and omitted to make investigation as to the truth of said statement.

The moving defendant contends that the complaint should be dismissed because the First and Fourteenth Amendments to the United States Constitution prohibit this libel action brought by a public official against critics of his official conduct; that defendant has a right under the Constitution of the United States to criticize the official conduct of public officials on the basis of the facts available to him as a member of the public; that under the circumstances herein, he claims he is entitled to publish criticism which he believes to be true, whether or not it can be proved true.

Defendant relies mainly on *New York Times Co.* v. *Sullivan* (376 U. S. 254) in support of his position. In that case, the *New York Times* published an editorial advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of the Negro right-to-vote movement and the Negro student movement. Sullivan, an elected Commissioner of the City of Montgomery, Alabama, brought a civil libel action against the *New York Times* and others and recovered a substantial verdict against defendants therein, which was affirmed by the Supreme Court of Alabama, and the United States Supreme Court granted certiorari. The United States Supreme Court reversed the judgment stating *inter alia*:

"We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct" (p. 264). * * *

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (pp. 279-280). * * *

"We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable" (p. 283).

As to who is a public official, the Supreme Court was careful to point out:

"We have no occasion here to determine how far down into the lower ranks of governmental employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. * * * Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department" (p. 283, n. 23).

Decisions of our local courts which have dealt with defamation of "public officials" have shown a trend toward liberality in the extension of the doctrine of the *Times* case to persons not actually holding office. The reluctance of our highest court to define "public official" or to fix the boundaries of "official conduct" has resulted in forecasts of a "further erosion of the protection heretofore given by the law of defamation" so as to embrace all persons within the public arena. (*Pauling* v. *News Syndicate Co.,* 335 F. 2d 659, 671 [C. A. 2d].) In supporting the view that the *Times* doctrine should be broadened to include candidates for office, the court there said: "Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line". In *Bingham* v. *Buckley* (N. Y. L. J., Aug. 4, 1964, p. 9, col. 2 [DICKENS, J.]) the principle of the *Times* case was applied to a candidate for Congress. And in *Gilberg* v. *Goffi* (21 A D 2d 517) the doctrine was extended to an action brought by the law partner of the Mayor, who was a candidate. An interesting criticism of the trend toward expansion of the *Sullivan* doctrine by a leading authority on the Law of Libel and Slander, Ernest P. Seelman, appears in the *New York Law Journal* (Sept. 27-Oct. 1, 1965, inclusive).

Plaintiff argues, however, that he is not a "public official" within the meaning of the *Times* decision. He is not an elected official, nor even a candidate for election; he is not a governmental executive charged with responsibility in administering public affairs. He chooses to regard himself, together with thousands of other governmental employees, as "in the lower ranks of governmental employees." But the title of the office and the function it normally serves are not the only criteria for the determination of the extent of the qualified privilege. The relation of the alleged libel to his "official conduct", and the public interest or concern in the publication, are matters upon which the court placed great emphasis.

Newspaper, television and radio reports published immediately after the incident stated that plaintiff, a police officer, weighing 200 pounds, 6 feet tall, who had been cited several times for disarming men with guns, had, while off duty, shot and killed a 15-year-old boy of slight build. Defendant, a leader amongst groups of citizens concerned with the establishing of a Civilian Review Board to hear citizens' complaints against police officers, and concerned particularly with a proposed recommendation that off-duty policemen be denied the right to carry guns, was frequently engaged in discussion and debate on these subjects.

While a qualified privilege does not protect statements about every person employed by an agency of government, the rationale of the *Times* opinion was that the privilege would be extended to a debate on "public issues", designed to bring about "political and social changes desired by the people." The new constitutional definition of libel commanded by the First Amendment and applied to the States through the Fourteenth Amendment was based on the principle that "debate on public issues should be uninhibited, robust, and wide-open." Throughout the opinion emphasis is placed on "public discussion", "free political discussion", "public questions", "public institutions", "so that the Government may be responsive to the wishes of the people" (pp. 269, 270, 274, 276).

In a strictly literal sense the occupant of a government position, even of a minor nature, is a public official. Recently the Appellate Division of this Department authorized a pretrial examination in support of a defense predicated on the *Times* case, where the "public official" was an Assistant Corporation Counsel of the City of New York (*Schneph* v. *New York Times Co.*, 22 A D 2d 641). In other jurisdictions statements about a policeman (*Lafferty* v. *Houlihan,* 81 N. H. 67), and an investigator for the District Attorney (*Jones* v. *Express Pub. Co.*, 87 Cal. App. 246) have been held conditionally privileged. The court in the *Times* case was careful to point out (p. 283) that communications by a government employee are at least qualifiedly privileged, and a "fair equivalent of the immunity granted" is to establish a corresponding immunity for citizens' statements about officials (*Barr* v. *Matteo,* 360 U. S. 564, 573-575). "It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted" that provides the privilege (*New York Times* v. *Sullivan,* 376 U. S. 254, 273). Under the circumstances here disclosed, application of the constitutional ruling in the *Times* case to plaintiff as a "public official" is appropriate.

Assuming, however, that plaintiff is a "public official", the issue of actual malice herein should be determined at the trial. "The general rule is that in the case of a libelous publication the law implies malice and infers some damage" (*Bingham* v. *Gaynor,* 203 N. Y. 27, 31).

However, where publication is presumptively privileged, no action in libel will lie unless such a publication was motivated by actual malice and was false (*Shapiro* v. *Health Ins. Plan,* 7 N Y 2d 56; *Ashcroft* v. *Hammond,* 197 N. Y. 488).

It has been held that actual malice may be inferred from the language and tenor of the libelous statement or the extent or excessiveness of the publication thereof (*Moyle* v. *Franz*, 267 App. Div. 423, affd. 293 N. Y. 842; *Hamilton* v. *Eno*, 81 N. Y. 116, 124; *Collier* v. *Postum Cereal Co.*, 150 App. Div. 169; *Pecue* v. *West*, 233 N. Y. 316).

Plaintiff charges that these posters were circulated and published while an official investigation of the incident was being conducted by the Police Review Board and the Grand Jury. The posters themselves, their design and construction, the placing of the words complained of above the picture of plaintiff in uniform—these are all subjects for factual interpretation on the issues of actual malice and fair comment (*Mencher* v. *Chesley*, 297 N. Y. 94; *Hoeppner* v. *Dunkirk Print. Co.*, 254 N. Y. 95, 105). In the circumstances herein, the dismissal of the complaint is not warranted. Accordingly, the motion is denied.

Stipulation Waiving Certification

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, order appealed from, opinion of Brust, J., and all the papers used before the Court below in making such order, all of which are on file in the office of the Clerk of the County of New York. Certification thereof hereby is waived.

March , 1966.

Denison Ray
Attorney for defendants-appellants
Farmer and CORE

Saxe, Bacon & Bolan
Attorneys for plaintiff-respondent

BENJAMIN SPIEGEL
COUNSELOR AT LAW

TELEPHONE 759-2700
AREA CODE 212

598 MADISON AVENUE
NEW YORK, N. Y. 10022

APRIL 26, 1968

Dear Steve

Re Gilligan vs Farmer
et al [2 cases]

As per our phone talk to-day, I enclose herewith for your file Xerox copy of the decisions of the Appellate Division on the appeals taken from the three (3) orders entered at Special Term in the Gilligan cases, as reported in to-day's New York Law Journal.

I would appreciate it if you could procure for me copies of the Respondents briefs submitted by Saxe, Bacon & Bolan Esqs (counsel for Gilligan) to the Appellate Division on the two appeals in which you were co-counsel (If you have file copies, I would be glad to Xerox them here and return same to you.)

With kind regards and best wishes for success in your "search" [illegible],

Sincerely yours
Benjamin Spiegel

Stephen M. Nagler Esq
164 Madison Avenue
New York, NY 10016

MSS SEDFRE
546

Gilligan, Thomas R. vs Farmer, James; C.O.R.E.; et al.
Notes

Box 37
Folder 4

State Historical Society of Wisconsin

Please Retain Original Order

MEMO TO FILE

July 16, 1964
9:30 PM

At approximately 1:00, I returned to the office from Queens. Mike told me concerning the Powell incident. I spoke to Coleman, then called the District Attorney's office. Unable to reach Worgan, left a message with Joe Stone's secretary, Mrs. Hep. At 1:20 spoke to Savatt; he wrote down at my dictation the complaint, gave me five names; sent Mike to area with East River man to find witnesses.

Then spoke to Hermann, explaining our position, that we would investigate, etc. He assured me that his office would move with great diligence and investigate in depth.

Mike called from the precinct to tell me that witnesses had been more or less cleared from the area, were at the precinct. Mike instructed to talk to Assistant D.A. at the scene to get witnesses either as they left or be permitted to watch interrogation. Watching interrogation denied. Called Herman. He assured me that there would be no "chicanery" and that witnesses would come the front door and that if they wish to talk to us, it would be permitted.

lawyers to go to the area to visit potential witnesses.

About five, conferred with Coleman here. Had spoken to A.P. x carefully told them that we were investigating charges of racial motive in killing. Explain not fair to give detailed statement since we as yet were merely investigating. Arrangements with Coleman were that we would investigate, then cooperate fully. Understanding that we would not give [illegible] potential witnesses' names now but would later. Witnesses due at East River at 6:30.

Mike called to advise rumours of threats against witnesses still being held. Arranged to meet Carl. Carl, Val, Mimi Hernandez and I, together with volunteer secretary, went to precinct.

Two girls were, about 2 or 3 minutes after we got there, rushed out by two policemen in plain clothes. Obviously frightened and obviously been told not to talk to us. Mimi protested. Said Mike to call assistant D.A.;went to telephone to call assistant Chief Inspector Detective Manhattan North. Was told that in the interim, Commission Human Rights lawyer made protest on their behalf. Coyle also spoke to Commission Attorney. Coyle invited us for interview.

Returned to precinct. Carl, Mimi and I sat with Coyle and three of his men, Carl indicated that the Assistant DA had been quite rude about his causing witnesses to be pushed out of precinct and driven home so that we could not talk to them. Coyle agreed to furnish us list of witnesses (later furnished to Mike at our request).

At Carl's question, Coyle indicated policeman not to be arrested because "justified hommicide". We protested. He indicated that he would not furnish list of all witnesses. We indicated that we would furnish all witnesses to DA. proper authority; Coyle did not deny this. We indicated our desire to have fair and complete investigation, consequently, desired names of all witnesses. Coyle indicated he would not. Left it to his discretion, but pointed that we wanted full and fair investigation.

Went to East River (Carl's own secretary having preceded us). Found Marguerite Heins there (at our request), interviewing one witness with volunteer secretary. Coud not get the Adams girl to come down, Consequently, Carl, Mimi and I went to Admas girl. tape. She indicated that boy was quiet, well liked. No trouble as far as she knew. Did not see . Carl arriving shortly after. Placed time at about 9:30. Other witnesses placed time at 9:45 or slightly later. Indicated that Powell boy in early shift. Was on the street with several people from school at time of incident according to her information.

Waited for other witnesses to appear. Made arrangements with Mrs. Callander to cause boy's background to be checked by Bronx Chapter and also additional witnesses secured. these names of additional witnesses and indicated willingness to assist in getting cooperation.

Mrs. Heins left while we were interviewing Adams. Carl left around 8:00 with Mike. Detained Mike to watch demonstration due 7/17 AM.

Waited with Val and Mimi until about 9:00 then went to office.

Gilligan Case - July 17, 1964

Mike at demonstration site 76 street 8:AM came to office about 9:45. Talked to Mike about 10:00 and periodically thereafter. No problems until about 11:00, when inspector White indicated limit of ten demonstrators across the street from the police station. Called Savatt but unable to reach him . Went on the scene, talked to White, acting chief Tqaylor adjustment satisfactory to Sprowal. Demonstration was orderly.

At demonstration site spoke Coyle. Asked him "Why did Gilligan refused drunkometer test?". Was told reasons why people refused such test. admission of refusal. Continued for several minutes on the subject. Coyle ~~admitted that drunk~~ never denied that drunkometer offered or refused.

Betty Adams indicated to Mike earlier interview with Lynch in which he said there was no knife.

Made statements to several reporters indicating seriousness of situation, particularly failure to jail Gilligan and statements of Coyle prejudging situation. Told Coyle I would take position with regard to his statements.

On return to office, interviewed witnesses, turn rest over to Jules for interview. Clear pattern emerging that boy was shot while empty handed and with hands, elbows bent, near shoulder level shaking hands ~~left~~ left to right in "No" motion.

Asked each witness to give us additional witness names.

Before going to demonstration, had received call from Mrs. Marsh, Powell's aunt, requesting me to visit her. Arrived at place where Mrs. Powell is staying temporarily (Pierce, Apt. , 125 W., 141 St.) approximately 3:15. Mrs. Pierce, Mrs. Powell, Mrs. Marsh and Rev. Terrell present. Assured them CORE would not abandon investigation. Told them pattern emerging as we saw it. Rev. offered help of financial nature. Gratefully accepted. Told him to send money to Val Coleman, earmarked for this purpose. Told him lawyers not receiving fees. Recommended Sutton and Sutton as counsel ~~suit~~ for civil suit against city (checked Sutton later, OK), on grounds such suit not in my competence.

Terrell agreed to ask Harlem ministers group to adopt resolution and take position on this case Monday night at regular meeting. Asked Powell to get herself for interviewing. Asked Mrs. Marsh if next week she would give us names of friends for potential witnesses. Told my Mrs. Marsh that as x far as she knew, no juvenile trouble. Subsequently told by reporter that police claiming one acquittal for robbery and a couple of minor juvenile offenses. Subsequently told by Hermann character of boy not in doubt.

On ~~the~~ return found messages re anonymous phone calls. In one, Cilligan said to have been going Va. for mental hygiene clinic treatment for about ten years, claim No. 12440934. Also alleged he previously shot two people, possibly while correction officer, and has history as drunk. Further, at time of previous shooting, had arm bandaged, claiming slashed. This is essentially claim now made.

Subsequently talked to Paul Montgomery of New York Times, UN5-3086 (Home), 566-1388 (Times). He said he x saw medical records at Roosevelt Hospital showing treatment for contusion fifth finger, right hand. Treatment splint. No cut. Montgomery plans to talk to doctors as soon as available. Montgomery further said that Gilligan started as chauffeur, gained promotion twice by off-duty heroism. On at least one occasion, an incident occured in same neighborhood. Says Gilligan probably lives in area. Was allegedly in radio shop for repair of radio which he left behind. Proprietor gave no address. There is a Bernard Gilligan who lives in Lynch's building. Has not been home for two days. Montgomery further says Irish Bar on block has customer with definite races views.

Gilligan definitely not married.

In afternoon, sent Mike to East River to cool situation which had arisen.(He actually rode uptown with Mrs. Brassard and myself). Was present when police gave summonses regarding street painting (?).

Was told witness Jackson (then still anonymous) would appear at 6:00. Jackson called at about 6:00, said he would appear later. Not present by 11:00. This is probably the telephone man. There was a telephone man who witnessed the incident. He is Negro. He spoke to another lady. Mike assigned to track down. Through

Mike requested additional xxk student aid for this case.

Arranged to have witnesses appear on Saturday.

During afternoon requested by Savatt to turn witnesses over to him, since he was starting investigation of his own. Told him we would be turning witnesses over to D,A.'s office next week at which time D.A. would presumably allow him to be present. Spoke to Hermann regarding appearance of witnesses next week. Satisfactory. Pointed kx out to Hermann that we could get witnesses because people less frightened when talking to us. Told Hermann we objected to failure to arrest Gilligan. Reported generally to Rachlin about 10:00, having been unable to reach him earlier.

GILLIGAN CASE - July 18, 1964 - 5:00 PM

This afternoon interviewed Rosalie Johnson.

Noted two photographs in July 17 issue Daily News, one showing Gilligan's arm bandaged all the way, the other showing only hand bandaged. Arm bear no marks. First photograph was on page 2 of July 17 Daily News. Second photo was in centerfold.

Story in today's papers (earlier edition last night) that police said third shot missed. This is implied confirmation of fact testified to by all witnesses, that third shot was fired after Powell was down. Second shot was fired after Powell was down and trying to arise or as he was going down.

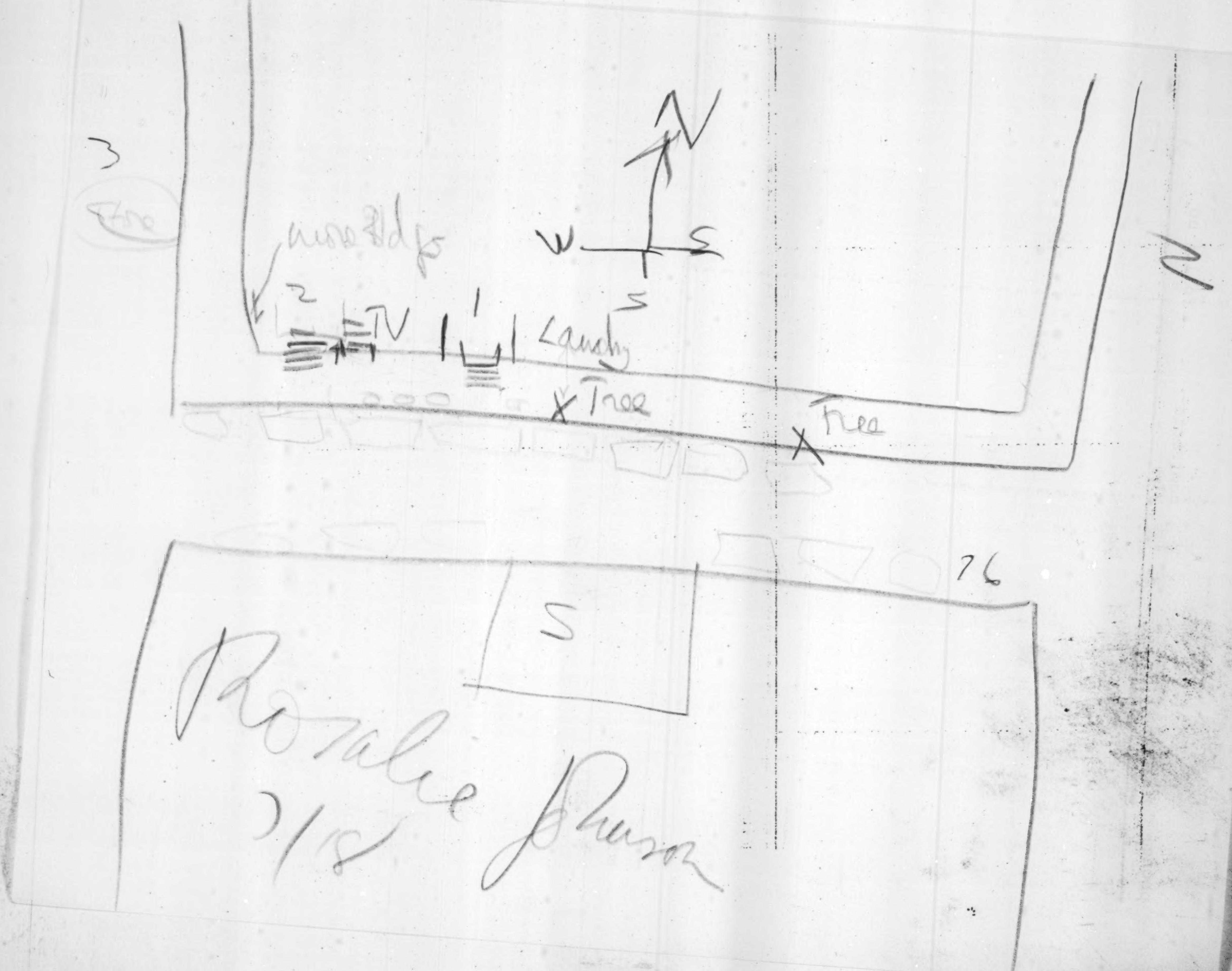
Informed by Captain Mooney, Gilligan on sick leave and under jurisdiction of Chief Surgeon (Steven McCoy). Mooney claims he does not know whether Gilligan ordered to remain home or permitted to leave town.

July 18. Times Story identifies teacher at school as finder of knife in the gutter. Allegedly found 8 feet from body.

Testimony being manufactured?

Believe may be enough testimony now available for arrest warrant.

Gilligan almost certainly lives at 215 E., 76 St. in home of Bernard Gilligan. Montgomery says that phone not answered for last two days. Mail box piled full, door bell not answered.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Rosalie Pherson
7/18

MEMO TO FILES

July 24th, 5:00 PM, told Herman that Herman Sanford, Jr. c/o his supervisor, Cuttingham, 399-3536 had been identified for us by Mr. Wessells of the Telephone Company and is the repairman who was making repairs on the block at East 76 St., on the 16th and who saw the shooting. Earlier, spoke to Herman, asked him whether ~~eh~~ they had seen Faye Podell, 517 E., 77 St., 628-5396 who had been sent to us by Harold Hart, work : Martha Jackson Gallery, YU8-1800, Home MU4-1799, who had been sent to us by Davis Platt, 240 E., 24 St., MU4-4413, work : WMCA, PL3-4405. Herman said Podell has been interviewed, Podell also has an Italian friend both of whom saw the incident. She is alleged to have thrown up at the site. Unable so far to reach Podell.

Reached H.R. Sanford, Bayside, BA5-5944. Told me on the telephone he did not witness shooting. Relayed to Herman with suggestion Herman follow up. He says he will.

Spoke to Milt Mollen today about 1:00 while chapter chairmen's meeting was in progress. Told him riot likely Saturday night, if Mayor took no constructive steps. Told him one would be on Mayor's head; he said he agreed with us about civilian review board. He had been unable to get the 369 or the Negro force involved.

MEMO TO FILES

GILLIGAN CASE - 7/24/64

Retained Joe Barrett's organization. Maximum expenditure $1,000.00 as authorized by James Farmer to work on Gilligan case. Must send a retainer letter and check for $500.00.

MEMO TO FILE

GILLIGAN CASE

At about 2:10, July 27, told Herman Boykin name and addresses, also suggested he checked New York City CORE groups; also told him to check into Gilligan background while serving in the Village before he was assigned to the 19th.

GILLIGAN CASE 7/28/64

Bullet that went wild at 215 went through the glass and penetrated only about 3/4 of an inch into the woodwork. This was observed by Joe Barrett. Probably deflected or went through the body since a 38 would normally penetrate further.

NOTE:

1. The knife was found 8 feet away from the body, allegedly by a teacher about 15 minutes or more after the shooting.
2. Gilligan made no effort to find or to retrieve the knife, although it was within his sight (if indeed it was on the scene at all) from where he was then standing.
3. The knife was found closed.
4. Ownership of the knife is supported by Harris and Dudley only.

WORKING HYPOTHESIS: Harris and Dudley are lying. Gilligan clearly ~~a~~ was not attacked by a knife if he made no effort to take it or find it.

The Harris boy may be lying because he was the one that started the trouble. This may be supported by the social worker's comment that the Powell boy was not a leader. This may be an elaborate construction by Harris to exculpate himself from any possible blame for what happened to Powell. Dudley plainly seeks mainly to support what Harris is saying. His story is not consistent with what Harris is saying (Dudley says that he got the knife at Powell's house; Harris says it was given to them on the bus. Both boys say that each of them got a knife at the same time.

As to the order of bullets, the testimony is consistent with the first bullet having gone into the abdomen, out the back, through the glass and then into the woodwork. This would account for the failure of the bullet to bury itself more than 3/4 of an inch in the wood. If so, it was the second bullet which was fired into the boy's arm. Alternatively, if the first bullet was fired into the boy's arm, it would have paralyzed that arm making any further attack impossible.

Jopson

1;00 100 shots being fired; in
kid screaming; running to window, cops coming
mob screaming

1:50 2 more battalions of cops coming up the street

2:45 description of police chain

3:15 shooting on 123rd St.; can't be heard on tape

3:45 more barriers being put up

4:10 more shooting up the road

4:30 can't see, everyone's running when the shooting starts in

5:00 bunch of police going down the road

5:20 bottles being thrown down on cops and cars

5:40 no weapons in the hands of Negros

6:00 no rifle fire

6:20 TV and radio on

6:30 trouble and bottles falling on 135th St,

7:00 he cant look out window; shots all over;
scared he'll get shot in

7:30 cops only holding nightsticks; pistols not drawn

7:50 police ambulance arrived

7:50-
8:40 musical interlude

8:50 police ambulance went up the street

8:50-
9:15 police beating people in

9:45 Marshal with him but nothing they can do

10:10 radio cars arrived

11;00 end

McKane

14:40-
15:40 cops wouldn't allow them into the group at the funeral home in

15:40-
19:00 useless or dangerous; don't let anyone listen to it before us

not on tape but reported: volley of shots;
also, police helicopter in area; crowd shifts up and across the street

Jopson

19:00 people at the hospital

19:15 asked to get people to the precincts

19:40 second ambulance arrived

21:30 refuses to go out in street, too dangerous in

22:00 whole mob shifted

GILLIGAN CASE

7/29/64 : Told Herman re stories about Gilligan's involvement with the TV repairman also concerning the depth of bullet. Investigation "most unlikely to be concluded next week".

Andrew Robinson DA 3-7132

Shirley Ann Robinson

last Wednesday afternoon

Someone called Shirley

wanted her to meet him at her school. Said they would meet her yesterday. No one showed.

El Faro - WA9-8210

George: Mr. Robinson called last Wednesday about 8:10 to ask if you or anyone from CORE had called his daughter, Shirley Ann, and arranged to meet her at school last ~~Wednesday~~ Thursday afternoon -- or whether it was a prank call. It seems that someone did this, but although Shirley waited, no one showed up. When she told her father about it, he insisted that she talk to no one again. (They said they were going to meet her and take her somewhere to talk.) He has instructed his daughter to tell anyone who wants to talk to her to have them get in touch with her parents. I replied that I thought this was a wise move, and told him that I would try to get in touch with you this evening -- that you had left for the day -- and have you call him. But that if I was unable to reach you tonight, you would call him tomorrow. He assured me that he would be home.

I tried having you paged at El Faro's, but was unsuccessful. Then I decided that all you could do was reassure him that it actually was someone from CORE, or that it was not someone from CORE, but in any event, Shirley isn't supposed to go with anyone unless the instructions come from you...so it was pointless to bother you with it this evening.

Dennis...

GILLIGAN CASE

Finney and I went to the school where Mr. Francke, the Principal, told us that Miss Greenspan would not ~~xx~~ talk to us. Subsequently gave her identification to Herman.

Took the occasion to examine the scene. The TV shop is in fact in 215. Next to it is the "porch" and the rather high stoop of 211. On the other side of 215's door is the dry cleaner. All this is very close together. The stoop of 215 really consists of one step up to a broad platform, and another step to the outer door, The inner door is perhaps three or three and half feet behind the outer door, The inner door is locked. The inner door is a single door, the outer door is a French. On the day of the shooting, the left hand door was closed, the right hand door open. Apparently the left hand door is kept locked in place, while the right hand door opens.

We saw a bullet hole and marks of digging out the bullet in woodwork about 40" (my belt height) from the floor in the vertical piece of wood frame running at the left side of the inner door as you face it. In the left outside half-door, two windows ~~x~~ up from the bottom, it is apparent that the glass has been replaced. This was the pane of glass through which the bullet passed on its way to the wood. Another window was apparently broken out, somewhat lower down in the bottom row of the wood by a rock or can, probably a can thrown by one of the boys. Standing at the base of the stoop on the sidewalk, one can see that the bullet would have been fired at waist height slightly from right to left, about 15 or 20º and slightly up, 5 to 10º .

The bullet buried itself in the wood. I would guage it buried itself approximately 1-1/4 to 1-1/2" to the point. Herman mentioned to me some of the things the ballistic man had told him, outside the grand jury. There would appear that the bullet did not have sufficient spin on it (I would think he means yaw) to support the conclusion that it passed through a body. However, the ballistic ~~man is m~~ man's opinion is by no means conclusive in this respect according to Herman.

We met Inspector Savitt on the scene. Savitt indicated to us that they will contend that the knife was found open. They will also contend that the shot lodged in the wood was a warning shot. There was, in other words, no other warning shot, but one fired dead accross the front of the boy as he emerged from the door. This appears like a very strange sort of warning shot.

The stoop has next to it iron railings on each side rising approximately 35" above the platform. It may that ~~they~~ the boy fell against the stoop but it seems quite impossible for him to have fallen over the stoop railing as one or two witnesses suggested. On the left side, (that is the 211 side) of the stoop, the TV people seem to keep old air condictioners and junk piled up, which probably were there on the day of the shooting. This alone would have prevented the boy's falling over the railing.

TheTV people refused to talk to us. It is not that they were unfriendly, it was that they simply did not wish to talk to anyone further. It would appear to me that they have some relationship with Gilligan and they are protecting him.

The distance between the door of the TV shop and the door of 215 cannot be more than 10 feet, even allowing for running out of the TV shop to the front of the stoop would not be more than 15 feet.

There is a good view from the desk of the cleaner's to the front of the stoop but from that position one cannot see the door of 215. The owner of the cleaner's Luberoff, RH4-9748, Quick Clean Center, was there at the time of the shooting and apparently saw something, He would have had a good view of Gilligan (i.e. did he have a badge on?).

Miss Greenspan, who is in room 417 at the school could have seen something, but she would have been about 100 feet away. Room 417 is nearer to the east end of the school building, on the north side.

We could not find any water tap outside 211 or 215. It is possible that the hose was connected through some iron' bars into the basement apartment at 211, where a kitchen sink is right behind the window. 211 appears to have a basement and a ground floor duplex, with two other apartments above. The small space involved between Gilligan's starting point and the door of 215 make the whole matter stranger and stranger. It is possible, if the boy yelled something about cutting Lynch, that Gilligan heard him.

On the other hand, it does not appear that the Powell boy was committing a crime or could be attempting to commit a crime at the time when he was shot. Herman impliedly suggested that perhaps there was a "attempt". I very carefully pointed out our attitude that, we knew and Herman repeated, that a ~~x~~ grand jury is instructed that it is justified in returning an indictment on the basis of the evidence showing a crime, disregarding any possible defenses. I pointed that in my opinion there ~~x~~ was some danger that a grand jury might, because a cop is involved, lean over backwards or almost automatically take into consideration the possibility of a justification defense.

Herman seems to have considerable respect for this particular grand jury, terming them confidentially a hard working group. He also called them "hard thinking".

We went around the corner, talking to Mr. Nicholas at the delicatessen, another man who works there was present and a supplier. Nicholas, in a very philosophic sort of way, said that the kids were constantly raiding them in groups of ten or fifteen. They are constantly swiping all kinds of stuff. The other day he even saw them climb over a Pepsi-Cola truck or a Canada Dry truck. The supplier, although he said very little, seemed much more exercised about all this than Mr, Nicholas. Nicholas vaguely recalls that on the 16th the kids also raided him in the morning, Nicholas says that between 9:00 and 1:00